MONTANA LEGISLATIVE HISTORY

913 pp.

Chapter 330 1995

Bill H _____ S 212 Original bill & history ✓C ✓

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Mar 03	✓C	Hearing Date(s)	Feb 14	✓C
	Mar 17	✓C		Feb 16	✓C
	_____	___C		~~2/15~~	✓C
	_____	___C		_____	___C
Date Out	Mar 14	✓C		Feb 16	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

2/15	2ND READING PASSED	48	2
2/16	3RD READING PASSED	47	3
	TRANSMITTED TO HOUSE		
2/20	FIRST READING		
2/20	REFERRED TO JUDICIARY		
3/03	HEARING		
3/10	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/11	2ND READING CONCURRED	95	1
3/14	3RD READING CONCURRED	97	3
	RETURNED TO SENATE WITH AMENDMENTS		
3/18	2ND READING AMENDMENTS CONCURRED	46	0
3/20	3RD READING AMENDMENTS CONCURRED	48	2
3/25	SIGNED BY PRESIDENT		
3/25	SIGNED BY SPEAKER		
3/27	TRANSMITTED TO GOVERNOR		
3/30	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 303		
	EFFECTIVE DATE: 10/01/95		

SB 212 INTRODUCED BY BISHOP, ET AL.

PROVIDE PROCEDURAL SAFEGUARDS FOR JOINT AND SEVERAL LIABILITY DETERMINATIONS

1/20	INTRODUCED		
1/20	FIRST READING		
1/20	REFERRED TO JUDICIARY		
2/14	HEARING		
2/16	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/18	2ND READING PASSED	37	13
2/20	3RD READING PASSED	38	12
	TRANSMITTED TO HOUSE		
2/20	FIRST READING		
2/20	REFERRED TO JUDICIARY		
3/03	HEARING		
3/15	COMMITTEE REPORT—BILL CONCURRED		
3/28	2ND READING CONCURRED	89	11
3/29	3RD READING CONCURRED	90	10
	RETURNED TO SENATE		
3/30	SIGNED BY PRESIDENT		
3/31	SIGNED BY SPEAKER		
4/03	TRANSMITTED TO GOVERNOR		
4/05	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 330		
	EFFECTIVE DATE: 04/05/95		

SB 213 INTRODUCED BY WILSON, ET AL.

INCREASE INCOME LIMITATIONS APPLICABLE TO A PROPERTY TAX EXEMPTION FOR A DISABLED VETERAN OR SURVIVING SPOUSE

1/20	INTRODUCED
1/20	FIRST READING
1/20	REFERRED TO TAXATION
1/21	FISCAL NOTE REQUESTED
1/24	FISCAL NOTE RECEIVED
1/26	FISCAL NOTE PRINTED
2/09	HEARING
2/28	TABLED IN COMMITTEE
3/29	MISSED TRANSMITTAL DEADLINE FOR 71ST DAY
	DIED IN COMMITTEE

SENATE BILL NO. 212

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PROCEDURAL SAFEGUARDS FOR JOINT AND SEVERAL LIABILITY DETERMINATIONS; AMENDING SECTION 27-1-703, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, on August 29, 1994, the Montana Supreme Court, in Newville v. State of Montana Department of Family Services, 883 P.2d 793, 51 St. Rptr. 758 (1994), struck down as unconstitutional part of section 27-1-703, MCA, limiting the common-law doctrine of joint and several liability; and

WHEREAS, the basis of the holding was that the statute lacked certain procedural safeguards; and

WHEREAS, the Legislature wishes to provide for procedural safeguards considered necessary by the Montana Supreme Court.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-703, MCA, is amended to read:

"**27-1-703. Multiple defendants -- determination of liability.** (1) Except as provided in subsections (2) and (3), whenever the negligence of ~~any~~ a party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) ~~Any~~ A party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to ~~him~~ that party, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate

cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants~~, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant~~. The liability of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, must also be considered by the trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all ~~such~~ persons listed in this subsection. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that ~~such~~ the employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of ~~this state~~ Montana, of any other state, or of the federal government. Contribution ~~shall~~ must be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section ~~shall make~~ makes any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to ~~him~~ that party.

(6)(a) In an action based on negligence, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty defense.

(b) In determining the percentage of liability attributable to persons who are parties to the action, the trier of fact shall consider the negligence of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to

the injury of the claimant or alter other proof requirements.

(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;

(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and

(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. However, this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation has expired."

NEW SECTION. **Section 2. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 3. Applicability.** [This act] applies to all claims for relief not reduced to final judgment on [the effective date of this act].

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

-END-

SENATE JUDICIARY

BILL NO	REFERRED	HEARING	OTHER CONSIDERATION DATES	EXECUTIVE ACTION/DATE/VOTE	REREFERRED	DATE READ
	1/18	2/02		PASS AS AMENDED VOTE:		2/13
SB0191	HARDING, ETHEL 1/18		URGE CONGRESS TO SPLIT NINTH CIRCUIT COURT OF APPEALS INTO 2 CIRCUITS	VOTE:		
SB0192	VAN VALKENBURG, FRED 1/18	1/25	PROSECUTOR SERVICES COORDINATOR'S SALARY SAME AS FULL-TIME ATTORNEY'S	1/27 DO PASS VOTE:		1/28
SB0200	LYNCH, J. D. 1/19	1/31	REVISE AND CLARIFY CECRA (COMPREHENSIVE ENVIRONMENTAL CLEANUP & RESPON. ACT)	2/3 PASS AS AMENDED VOTE:		2/03
SB0203	GROSFIELD, LORENTS 1/19	1/26	WATER RIGHTS COMPACT -- BIGHORN CANYON AND LITTLE BIGHORN BATTLEFIELD	1/27 DO PASS VOTE:		1/28
SB0206	BURNETT, JIM 1/20	2/06	REVISE LAWS ON INVESTIGATION AND REMOVAL OF CHILD IN SUSPECTED CHILD ABUSE 2/13, 2/15	2/16 PASS AS AMENDED VOTE:		2/16
SB0211	KEATING, TOM 2/04	2/09	RE: PROPERTY OWNER'S LIABILITY TOWARD PERSONS USING PROPERTY FOR RECREATION	2/14 PASS AS AMENDED VOTE:		2/14
SB0212	BISHOP, AL 1/20	2/14	PROCEDURAL SAFEGUARDS FOR JOINT AND SEVERAL LIABILITY DETERMINATIONS	2/16 PASS AS AMENDED VOTE:		2/16
SB0218	CHRISTIAENS, CHRIS 1/21	1/27	REVISE LANDLORD TENANT LAWS 2/07	2/08 PASS AS AMENDED VOTE:		2/08
SB0220	BARTLETT, SUE 1/21	1/30	ELECTRONIC RECORD-KEEPING FOR COURTS	1/30 DO PASS VOTE:		1/30
SB0229	HARGROVE, DON 1/24	1/30	CRIMINAL FORFEITURE OF PROPERTY FOR DRUG OFFENSE; OFFENSE TO POSSESS	1/30 PASS AS AMENDED VOTE:		1/30
SB0233	HARP, JOHN 1/24	2/10	RETURN ATTORNEY FEES TO INSURER IF CLAIMANT GOT WORK COMP BENEFITS ILLEGALLY	2/13 PASS AS AMENDED VOTE:		2/13
SB0237	BISHOP, AL		STATE OPEN CONTAINER LAW	2/15		

6

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on February 14, 1995, at 8:00 A.M.

ROLL CALL

Members Present:
Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: SB 212, SJR 7
Executive Action: HB 83, SB 292, SB 211, SB 318

EXECUTIVE ACTION ON HB 83

Motion: **SENATOR HALLIGAN MOVED HB 83 BE NOT CONCURRED IN.**

Discussion: **CHAIRMAN CRIPPEN.** In reading all of this language it seemed to him the opponents concern themselves with the educational aspect. The other area where he thought an amendment would be helpful is in the area of fine arts. There are quite a number of objections to this from individuals who are anti-pornographic but have a concern about how they would consider fine arts. They had a problem with the standard that was in the bill itself as it would apply to fine arts. To him

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR HOLDEN asked **SENATOR DOHERTY** what the study would accomplish.

SENATOR DOHERTY stated performance audits are one of the valuable functions which are performed in the interim. There should be recommendations of better ways to accomplish projects. Perhaps it may be more cost effective to contract services to computer experts.

SENATOR GROSFIELD asked **SENATOR DOHERTY** if he had a chance to preview the amendments.

SENATOR DOHERTY answered that he hadn't but would be in favor of the amendments. We have spent $1.2 million on court automation. We have been requested to spend another million dollars. He would like an outside look at the status of this program.

SENATOR CRIPPEN asked why he would not like to broaden the audit.

SENATOR DOHERTY answered the Supreme Court Administrator is charged with automation. The Supreme Court Clerk, the Law Library and the Water Court have not been charged with automation. He is concerned about automation in Montana's courts. If the committee wants to include the rest of the judicial branch in this audit, that would be fine. He is only interested in court automation.

SENATOR CRIPPEN asked when the Clerk of Court, the Law Library, or the Water Court was automated?

SENATOR DOHERTY stated he didn't know.

SENATOR GROSFIELD stated there was a large distinction between the original version and the amended version. The bill would audit the Administrator's Office. The amendment would audit the automated information systems in the various areas.

Closing by Sponsor:

SENATOR DOHERTY stated he would take another look at the amendments. The comments he has received from attorneys and clerks of court is that things are not running very smoothly. He believes it is time to audit the program.

HEARING ON SB 212

Opening Statement by Sponsor:

SENATOR AL BISHOP, Senate District 9, Billings, presented SB 212. In 1987 the legislature started a tort reform program. Part of that was dealing with joint and several liability. Prior to 1987, any defendant could be responsible in full for a plaintiff's injury to person or property. This resulted in the "deep pocket" theory. The defendant best able to pay the judgment was the target defendant. That defendant may have been responsible for a very small part of the process which caused the injury to the personal property. In 1987, we adopted the 50% rule. That rule stated that if the defendant was more than 50% responsible for the injury or the action which caused the injuries, he could be held fully responsible. If the defendant were less than 50% involved, he could only be held for that portion. The Supreme Court recently struck this down as unconstitutional. The case involved a target defendant. The target defendants right now are the State of Montana, health care providers and people with money. The court's opinion stated there had to be some procedural safeguards. Under SB 212, if an action is brought by a plaintiff against a defendant, and there were others involved who were also responsible, the defendant would now have a defense in his answer. Before, the defendant could raise this defense at anytime during the trial and surprise the plaintiff. That gave the plaintiff an unfair advantage because there was no way to respond. This bill will put into place the procedural safeguard that the defendant in its answer must plead as a defense that there were others involved in the incident. This would eliminate the element of surprise. It also specifies that the defendant, who would state in the answer that there are other people involved, has the burden of proving that those people were responsible, in part or in full, for the plaintiff's injuries. The finding in that action is not binding on the other people. What the court does in that lawsuit is not binding in any subsequent lawsuits brought by the plaintiff or anyone else against the parties named in the answer who are not actually parties to the lawsuit.

Proponents' Testimony:

John Alke, Montana Liability Coalition, stated that the Coalition spearheaded the 1987 tort reform movement. They reactivated this session to have this bill enacted into law. Prior to 1975, negligence actions in Montana were dominated by two common law doctrines. The first was the doctrine of contributory negligence. Under that doctrine, if a plaintiff was to any degree responsible for his injuries, he was absolutely barred from any recovery. That was a very harsh rule. The second common law doctrine was the doctrine of joint and several liability. After the plaintiff proved he had no responsibility for his own injuries, he was then entitled to his recovery from any defendant who was responsible, even minimally responsible. Another very harsh rule. In 1975, a system of comparative fault was adopted. They abolished the doctrine of contributory

negligence; however, they forgot about the doctrine of joint and several liability. Between 1975 and 1987, there was a system of comparative fault; however, in fact, it was not. An example would be a drunk driver driving down the highway with no ability to respond to traffic. Another driver comes around the curve, driving too fast, crosses the centerline, and the two parties side swipe each other. Because he is incapable of avoiding the other driver, he goes off the road and is killed. His estate gets a good lawyer and files suit against two defendants. One defendant is the driver who crossed the centerline and the other is the State of Montana. The State of Montana is named as a defendant because the edge of the highway was defectively designed. At trial the jury allocates 50% fault to the drunk driver, 49% fault to the driver who crossed the centerline, and 1% fault to the State of Montana. Between 1975 and 1987, the State of Montana could be required to pay all the recoverable damages of the drunk driver which would be the 50% the jury allocated. This was fixed in 1987. The State of Montana would only pay 1%. Now we have Newvill v. State of Montana Department of Family Services. Newvill did not invalidate the limit on joint and several liability. Newvill said you cannot allocate fault to a party not named by the plaintiff because of lack of procedural guarantees. He presented a scenario wherein, under Newvill if he was involved in a car accident with **SENATOR HOLDEN** and **SENATOR DOHERTY.** At trial the jury states he is 20% at fault, **SENATOR HOLDEN** is 40% at fault, and **SENATOR DOHERTY** is 40% at fault. Neither **SENATOR DOHERTY** nor **SENATOR HOLDEN** have to pay more than 40% of his damages. If, however, **SENATOR DOHERTY** settled with him prior to trial for 10%, **SENATOR HOLDEN** would owe 70%. Fault could not be allocated to **SENATOR DOHERTY** because he would no longer be a named party because the plaintiff settled with him outside of court. This does not only cover allocation, in a trial the parties are only permitted to introduce relevant evidence. If **SENATOR DOHERTY** is no longer considered for fault, the evidence of his negligence is inadmissible. The jury is mislead into thinking there isn't another party involved in the accident. SB 212, substantively will make sure that **SENATOR HOLDEN** will not be responsible for more than 40%. Procedurally the bill would make it necessary for **SENATOR HOLDEN'S** attorneys to advise him that they are intending to blame **SENATOR DOHERTY** for the accident. The statute specifically says that his attorneys will not have to disprove **SENATOR DOHERTY'S** negligence. **SENATOR HOLDEN'S** attorneys will have to prove **SENATOR DOHERTY'S** negligence. The bill would say that **SENATOR DOHERTY** is absolutely unaffected by whatever allocation of fault the jury gives to him in the trial with **SENATOR HOLDEN.**

John Sullivan, Montana Defense Trial Lawyers, stated their support of SB 212 and also offered an amendment, **EXHIBIT 7.** The amendment related to a case decided by the Montana Supreme Court on January 18th of this year. This was too late for it to be incorporated into this bill. The decision is Wetch v. Unique Concrete Co. The plaintiff in this case worked for a chiropractor who had decided to remodel his office. Unique

Concrete Company was hired to take out the back steps. This left a hole in the ground. The president of Unique met with the doctor and advised him of the hazardous situation. They suggested barricading the door. The doctor didn't want it barricaded and said he would take care it. Unique Concrete continued working in the backyard. Mrs. Wetch, the employee who always used the back door, used the front door for a week. One day, she went out the back door, fell and injured herself. She hired a lawyer who sued Unique Concrete. At the trial, the lawyer put Unique Concrete's President on the stand and told him he knew when the steps were taken out there was a hazardous situation. He also told him that he didn't do anything about it. The witness wanted to explain the reason; however, the judge told him he could not say anything about the employer's negligence. This was appealed to the Montana Supreme Court. The Court stated the district court followed the law. The sentence they want removed states that the negligence of an employer or a co-employee cannot be considered. The employer cannot be sued. Workers' compensation law affords immunity to the employer and any co-employee for any act taken with respect to a workers' compensation accident. That will not change. The jury will be allowed to consider their negligence against a third party. The burden will be on the defendant who presents that evidence to prove its case.

Allen Lanning stated his support for SB 212. In Newville, in their zeal to correct a perceived problem of plaintiffs, the Montana Supreme Court perpetrated an injustice on civil defendants. By preventing the allocation of negligence to non-parties, the Supreme Court has reinstated a way for plaintiff's attorneys to unjustly maximize their client's recovery through manipulation of the judicial system. Through settlement and through choosing the parties sued, plaintiffs may impose a lion's share of liability on a defendant who, considering the actions of all the tortfeasers, is only marginally responsible for the accident. This is wrong. Parties who are less than 50% negligent should be responsible only for their share of the negligence. Plaintiff's attorneys argue that without the ability to do this their clients may not be made whole and that that is not fair. It has never been an accepted tenant of law or morality that it is okay to correct one injustice by perpetuating another. Plaintiff's attorneys now also argue that defendants, by virtue of insurance or other assets, do not suffer much from this injustice. As a famous quote states, injustice is not one of those poisons which, although fatal in large doses, may be taken with beneficial affect in small doses. Injustice is fatal in any dose. Some civil defendants may be held liable for injuries for which they have no responsibility whatsoever. Plaintiff's attorney will argue that under SB 212 they will be unfairly prejudiced because the nonparties will have no one to defend them at trial. The plaintiff's attorneys themselves can and should do this. They are responsible to determining who they sue and who they settle with. The crux of the Newville decision

was that the old statute violated procedural due process. SB 212 corrects this.

Bill Gianoulias, Chief Defense Counsel Risk Management and Tort Defense Division, spoke in support of SB 212. It is fundamentally fair to let the jury decide who is responsible to pay damages and they must have the information necessary to make that decision. The Newville case was defended by their office.

Jim Tutweiler, Montana Liability Coalition, spoke in support of SB 212. This Coalition worked very hard to bring about the enactment of the joint and several liability bill. They believe that this bill will restore fairness and predictability to the system.

Dr. Mike Schweitzer, President of Billings Anesthesiology, spoke in support of SB 212. They believe in equity and fairness in determining the share of economic liability as a proportionate share of their comparative fault in any injury. If they, or an individual in their business, is found liable for a partial share of one's injury, their business or that individual should pay his or her fair share for that injury. They should not have to pay more than their fair share.

Tom Harrison, Montana Society of Public Accountants, stated they support SB 212.

Steve Turkiewicz, Automobile Auto Dealers and Member of the Liability Coalition, spoke in favor in SB 212.

Carl Schweitzer, Montana Contractors Association, spoke in support of SB 212.

Bob Worthington, Montana Municipal Insurance Authority, spoke in support of SB 212.

Marie Durkee, Executive Director of the Montana Tavern Association, spoke in support of SB 212.

Ben Havdal, Montana Motor Carriers Association, spoke in support of SB 212.

Don Allen, Montana Wood Products Association, supports the bill.

Mona Jamison, Doctors' Company, stated they insure 675 Montana physicians and urge support of this bill.

Russ Ritter, Washington Corporations, supports the bill.

Ron Ashabranen, State Farm Insurance, stated they have 320,000 policies in Montana. They support SB 212 and the amendment.

Tom Hopgood, Montana Independent Bankers Association, supports the bill.

Michael Keedy, Montana School Boards Association, spoke in support of SB 212.

Jacqueline Lenmark, American Insurance Association, urged support of SB 212.

Riley Johnson, National Federal of Independent Business, urged support of SB 212.

David Owen, Montana Chamber, stated he has had extensive discussions on whether or not the Court will accept this bill as the answer. He urged the committee to pass this bill so they can get an answer from the Court.

Greg Jackson, Montana Association of Counties, spoke in support of SB 212.

Jerry Lindorf, Montana Medical Association, urged support of SB 212.

Steve Browning, Montana Hospital Association, urged support of SB 212.

Bill Leary, Montana Bankers Association, spoke in support of SB 212.

Charles Brooks, County Commissioners of Yellowstone County and Billings Chamber of Commerce, stated they stand in favor of SB 212.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association, spoke in opposition to SB 212. This bill does not correct the constitutional deficiencies. The Court will find that this bill is constitutional. Newville invalidated a small provision of the 1987 amendments on joint and several liability. It did not upset joint and several liability in general. Newville said the 1987 amendments are unconstitutional because they violate substantive due process. It subjects nondefendants to being tried in a court and blamed without having the opportunity to defend themselves. That is what SB 212 will reinstitute. The second reason the 1987 amendments are unconstitutional, is because it requires plaintiffs to argue the case of other "nondefendants". Substantial due process is an unique type of unconstitutionality in the law. The Court states that this fundamentally violates the principles of justice and fairness. He presented **EXHIBIT 8.** The Court said there cannot be an empty chair in a courtroom and allow people to point fingers at the empty chair and not fill the empty chair. The proponents are saying that the problem is not that the chair is empty, the problem is it needs new upholstery. He presented written testimony, **EXHIBIT 9.**

{Tape: 2; Side: B}

Randy Bishop stated that in 1987 joint and several liability was modified. If the defendant is less than 50% at fault, he would only pay for the percentage for which he was responsible. The **Newville** decision did not change that. It said that if you want to blame someone else, sue them. SB 212 in (4) provides any party, including the defendant, the opportunity to do that. The **Wetch** decision applies the law the way the legislature wrote it. There is only one circumstance in which the settling party's evidence vanishes. This only happens in an employment situation. The nonparty defendant is not told that they are brought into the case. How does the nonparty defense work? An example would be two cars collide approaching a controlled intersection. Driver of car 1 claims that driver of car 2 ran a stoplight. Driver of car 2 realizes that there is some possibility that he ran the stoplight but he is not sure. An allegation is made about the stoplight. The defense hires an expert who says he noticed that the stoplight stays yellow for a delay of two seconds. The standard should be four seconds. There is a design problem. During the course of deposition, the driver of car 1, the person who was injured, admits that there was a sidewalk sale. Another deposition contains testimony that there is a flashing time and temperature sign on a nearby building. These are all distractions which can generate a nonparty defense. The city could be responsible for the traffic light. The downtown merchants association could be responsible for the sidewalk sale causing a distraction. The business with the sign on the building could also be responsible. These people can end up on the verdict form. The plaintiff can ignore it or he can sue these people. This is a nonparty defense. If there is a real claim, it doesn't need to be hidden.

John Richardson, MTLA, stated he has had a long time interest in the joint and several liability bill. He asked lawyers what effect this bill would have on the Montana judicial system. He handed out pictures of the child involved in the **Newville** case, **EXHIBIT 10.** This child was nearly beaten to death by a prospective adoptive parent. There were three to four defendants involved at trial. The plaintiffs named the parties who they believed were responsible and the ones they could recover from. They were: the State Department of Family Services; Edna Goodwin, a counselor who knew the adoptive parents; and Martha Kuipers, the wife who refused to recognize what was going on when the child was beaten.
At the end of the trial, the defense decided they wanted other people on the jury verdict form as provided in the joint and several liability statute. They named a number of other people. The Keeters were neighbors and friends of the Kuipers. Dr. Visher had seen the child on one occasion with bruises on her and did not recognize it as an abuse case. The Bozeman Police Department was asked to investigate a beating at a restaurant. By the time the police arrived it was all over with. They did

not have the authority to take her away from the parents. They reported this to the Department of Family Services. DFS did not properly follow up on it. The plaintiffs also asked for a line on the jury verdict form so that the jury could consider any other person. The judge left three on the jury verdict form. Edna Goodwin was probably the reason why the Supreme Court overturned this case. Edna Goodwin settled out beforehand. She was not a witness at trial, she was not present, no one represented her or presented any argument on her behalf; however, she ended up on the jury verdict form. She ended up being 35% responsible for what happened to the child. SB 212 solves some of the problems. Notice is given that certain people will be requested to be on the jury verdict form. SB 212 does not provide that the people will be notified. They are not allowed to defend themselves in court. They may not even know about it. People who are peripheral to the case could end up being 30% liable for what happened in some case. They would not have been informed that the jury was going to consider whether they were negligent. In Montana, there is a constitutional right to notice of the charges against us. We also have a constitutional right to defend against those charges. SB 212 does not solve that problem. The plaintiff now has a large incentive to settle. The more people the plaintiff names as defendant, the greater his burden. The plaintiff is encouraged to settle parties out of the case and narrow it down. The defendants also have an incentive to settle. Under this bill the incentive to settle goes away. Defendants can end up on a jury verdict form after they have settled. The plaintiff settles parties out for the money and narrowing down their burden. Under this bill the defendant can say, at the beginning of trial, he wants other people considered. The plaintiff then can sue the other people. Settlements will not be encouraged, instead there will be more defendants in every case which will drive up the cost of litigation.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR DOHERTY asked what would be wrong with requiring anyone who wants additional persons on the jury verdict form to have these persons brought in as a co-defendant.

John Alke stated that the rule of law in Montana is that when the defendant settles with the plaintiff, it bars any action against him by the other defendants.

SENATOR DOHERTY asked about the Bozeman Police Department or Dr. Visher, in the above example. Why should they be on the verdict form? Why not require the defendant to name them if they want to bring them into the suit?

John Alke stated that is what the bill specifically provides. If this case occurred again and he was the attorney representing FSD

and wanted to blame the Bozeman Police Department, he must notify the plaintiff that that is what he intends to do and then he would have the burden of proof that those parties were at fault.

SENATOR DOHERTY stated that the bill provides that he notify the plaintiff. Why wouldn't it be good policy for him to be required to name them as a party defendant?

John Alke questioned the situation if the defendant was an immune defendant. He can't sue an immune defendant.

John Sullivan answered that in the **Wetch** case that was the problem. Unique Concrete could not name the doctor because he is immune from suit under the workers' compensation law. This bill will change the situation to allow the jury to be told the truth about everything that happened in the accident.

SENATOR DOHERTY asked why the burden should not be placed on the defendant to drag those defendants in who may not be immune from suit or who may have already settled out. Why give the defense the opportunity to blame someone who has not been involved in the lawsuit?

John Sullivan stated that they could if they wanted to do that. This bill would allow them to do that. They have a choice. There is no good reason why you do not allow this opportunity to tell the jury about everything that happened.

SENATOR HALLIGAN asked about providing notice to a nonparty.

John Sullivan stated he would have no objection to adding in this bill that when the answer is served upon the plaintiff, a copy of the answer be served upon anyone in that answer that the blame is pointed at.

SENATOR HALLIGAN stated that even if they provide that other procedural safeguard, what can he do if he is named and no one sues him to get him into the case.

John Sullivan stated he doesn't know if he has a right to intervene or if he would want to intervene. This bill states the jury's allocation of fault cannot affect him.

SENATOR HALLIGAN, referring to the nonparty who sees his or her name in the paper, asked if it would be worse to be notified in that way?

Randy Bishop stated that the person is always better off if he can defend himself. Why would a defendant use the nonparty defense rather than bring a lawsuit when it is easier to prove that someone did wrong if they are not present? The defense bar wants to have the procedural ability to set up a straw man which they can knock down undefended or burden the plaintiff with the obligation to defend that person.

Closing by Sponsor:

SENATOR BISHOP commented that the opponents would rather have the people brought into the lawsuit rather than name them as a nonparty in the answer. If they are brought into the lawsuit, they not only are named but they will have to hire a lawyer to defend themselves. If you believe the defendant in a lawsuit in Montana shouldn't pay more than his or her fair share of whatever the amount of fault that defendant had, you should support this bill.

Additional handout, Doctors' Company, **EXHIBIT 11.**

1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL

DATE 2/14/95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 2/14/95
BILL NO. SB212

AMENDMENTS TO SB 212
SPONSORED BY MONTANA DEFENSE TRIAL LAWYERS

1. Title: line 5.

FOLLOWING: "DETERMINATIONS;"

INSERT: "AND TO PERMIT THE CONSIDERATION OF NEGLIGENCE BY AN EMPLOYER OR COEMPLOYEE IN CERTAIN CIVIL ACTIONS;"

2. Page 1.

FOLLOWING: line 13

INSERT: WHEREAS, on January 18, 1995, the Montana Supreme Court in *Wetch v. Unique Concrete Co.*, ____ *P.2d* ____, *52 St.Rptr. 5 (1995)*, interpreted section 27-1-703, MCA, to preclude the trier of fact from hearing about or considering the negligence of the plaintiff's employer, in a case in which that negligence should have absolved or substantially limited the liability of a contractor doing work on the employer's office building; and

WHEREAS, the Legislature wishes to provide that negligence on the part of the claimant's employer or coemployee may be considered and determined as part of a nonparty defense, as provided herein.

3. Page 2, lines 8-12.

FOLLOWING: "listed in this subsection."

STRIKE: remainder of line 8 through "federal government." on line 12.

ks:L.4

EXPLANATION FOR THE AMENDMENT TO SB 212 PROPOSED BY THE MONTANA DEFENSE TRIAL LAWYERS

The Montana Defense Trial Lawyers (MDTL) has proposed an amendment to SB 212 deleting the provision of § 27-1-703 which prohibits the trier of fact from considering the negligence of an injured person's employer or coemployee.

The reason for this amendment is the Montana Supreme Court's decision in ***Wetch v. Unique Concrete Co.***, which was issued on January 18, 1995. The facts of the ***Wetch*** case demonstrate dramatically the reason and need for this amendment.

The plaintiff, Janice Wetch, worked for Dr. Wallick in Miles City. Dr. Wallick decided to remodel his office building. As part of that process, the Defendant, Unique Concrete, was hired to remove the concrete steps outside the rear door of the building.

Before Unique started work, Unique's president talked to Dr. Wallick and the plaintiff about the safety hazard posed by removal of the steps outside the door. Unique's president suggested various things that could be done about the safety hazard, including barricading the door. Dr. Wallick did not want the door barricaded because the office needed ventilation. Dr. Wallick assured Unique Concrete's president that a warning sign would be placed on the door, that the door would be dead-bolted during regular business hours, and that Dr. Wallick would "take care" of the situation.

In reliance on Dr. Wallick's assurances, Unique Concrete did not barricade the back door. They proceeded to remove the steps, which left a hole five to six feet deep under the door where the steps had been.

Knowing the rear steps had been removed, the plaintiff used the front door to come and go from work. However, on the afternoon of September 25, acting out of either forgetfulness or force of habit, Ms. Wetch attempted to leave the building by going out the back door. She opened the door, fell into the hole left by the missing steps, and injured herself.

Ms. Wetch received workers' compensation benefits from Dr. Wallick's insurer. She then filed a lawsuit against Unique Concrete, alleging negligence on the part of Unique Concrete for failing to barricade the door. At trial, Ms. Wetch's attorney was allowed to ask Unique Concrete's president two things: (1) that he knew the missing steps posed a hazardous situation; and (2) that he did nothing to secure the door to avoid the hazardous situation. Unique Concrete's lawyer asked to be allowed to explain why no action had been taken to secure the door -- that this subject had been specifically discussed with both Dr. Wallick and the plaintiff, that Dr. Wallick did not want the door to be secured because of the need for ventilation, and that Dr. Wallick would be the one who would take care of the situation. This testimony was not allowed by the District Court because of the provision of § 27-1-703 which prohibits the trier of fact from considering the negligence of an employer. Not surprisingly, Unique Concrete was found liable. The jury's total damage award in the case was $200,000.

Unique Concrete appealed to the Montana Supreme Court, which affirmed the District Court's decision in an opinion entered on January 18, 1995. In its decision, the Court held that the sentence prohibiting consideration of the employer's negligence left it no choice. MDTL believes that the injustice of the result in this case is manifest, and that there is no

EXHIBIT 7
DATE 2-14-95
SB 212

good reason to prohibit the trier of fact from considering all of the negligence that contributes to an accident, including the negligence of an employer or coemployee.

In order to resolve the problem highlighted in the Supreme Court's decision, MDTL submits that the following sentence should be deleted from the text of § 27-1-703(4):

> However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government.

hk:MDTL.M1

JANICE WETCH,
Plaintiff and Respondent,
v.
UNIQUE CONCRETE CO.
a Montana Corporation,
Defendant and Appellant.

No. 94-176.
Submitted on Briefs October 28, 1994.
Decided January 18, 1995.
52 St.Rep. 5.
___Mont.___.
___P.2d___.

NEGLIGENCE - TORTS - STATUTES. Plaintiff brought suit for injuries she received in a fall at her workplace where defendant was doing remodeling work. Plaintiff filed a motion in limine to exclude consideration by the jury evidence of her employer's negligence and the district court granted the motion. Following trial, the jury apportioned negligence 51% to defendant and 49% to plaintiff and awarded damages. Defendant appealed. The Supreme Court held:

1. NEGLIGENCE - TORTS. Statute provided that trier of fact, in attributing negligence, may not consider or determine any amount of negligence on part of injured person's employer or co-employee to extent that such employer or co-employee has tort immunity under workers' compensation act. § 27-1-703(4), MCA (1987).

2. NEGLIGENCE - TORTS. Plaintiff's employer was immune from tort liability for plaintiff's injuries because plaintiff was covered by and received benefits under employer's workers' compensation insurance.

3. NEGLIGENCE - TORTS. Statute expressly prohibits any evidence of employer's negligence going to the jury where employer is absolutely immune from tort liability, and any amount of employer's negligence which caused or contributed to plaintiff's injuries cannot be considered or determined by the jury; employer's negligence is not part of liability or damages equation.

4. STATUTES. Supreme Court is not constrained to follow interpretations of state statutes by federal judiciary, especially where statutory language has not been previously interpreted by Supreme Court.

5. STATUTES. Where no constitutional challenge has been made, it is not prerogative of court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate and district court correctly applied statute in granting plaintiff's motion in limine.

Affirmed.

**Appeal from the District Court of Custer County.
Sixteenth Judicial District.
Honorable Kenneth R. Wilson, Judge.**

For Appellant: **Calvin J. Stacey**, Stacey & Walen, Billings.

For Respondent: **Thomas M. Monaghan**, Lucas & Monaghan, Miles City.

JUSTICE NELSON delivered the Opinion of the Court.

Unique Concrete, Co., (Unique) appeals from a special jury verdict in favor of Janice Wetch (Janice) finding that Janice's personal injuries were caused 51% by Unique's negligence and 49% by Janice's own negligence and awarding total damages of $200,000. Unique contends that the District Court erred in granting Janice's Motion in Limine restricting evidence of negligence attributable to Janice's employer, Dr. William Wallick (Dr. Wallick). We affirm.

ISSUE

The issue on appeal is whether the District Court properly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

FACTUAL AND PROCEDURAL BACKGROUND

At the time she was injured, Janice was the full time receptionist, office worker and assistant to Dr. Wallick, a Miles City chiropractor. Janice had worked for Dr. Wallick, first on a part-time basis and later, full time, since August 1984. She and Dr. Wallick were the only two persons who worked in his small, Main Street office building.

In 1989, desiring to add space to his offices, Dr. Wallick hired a local Miles City contractor to remodel the building. Prior to the remodeling, the office building had two doors, one at the front of the building facing Main Street, primarily used by patients, and another door at the rear leading to the parking lot. The rear door was routinely used by Dr. Wallick and Janice. As part of the remodeling project, Unique was hired as one of the subcontractors and was responsible for removing the concrete steps outside the rear door of the building.

Before Unique began work, Larry Kuchynka (Larry), Unique's president, had a conversation with Dr. Wallick, in Janice's presence, in which Larry expressed his concern about the safety hazard posed by the removal of the steps outside the rear door. Larry suggested various measures that could be taken to mitigate the danger, including barricading the door. Dr. Wallick did not want to barricade the door because of the need for ventilation. However, he assured Larry

that a warning sign would be placed on the door, that the door would be dead-bolted during regular business hours and that he (Dr. Wallick) "would take care of it." Relying on Dr. Wallick's statements, Unique did nothing to secure the door and proceeded to remove the concrete steps leaving a vacant hole five to six feet deep under the door where the steps had been.

Janice testified that she recalled discussing the door situation with Dr. Wallick and that she tried to keep the door locked. Moreover, knowing that the steps had been removed, during the week before her accident, Janice changed her routine and began using the front door to enter and leave work. Nonetheless, at about noon on September 25, 1989, out of forgetfulness or force of habit, Janice opened outward the rear door of the office, stepped into the five to six feet hole where the steps had been, and was seriously injured. Janice subsequently received benefits through workers' compensation insurance carried by Dr. Wallick.

In November 1991, Janice filed her complaint against Unique alleging negligence and seeking special and general damages for her injuries. Prior to trial, in its motion for summary judgment, Unique argued that Dr. Wallick's failure to secure the door was negligence and was an independent, superseding, intervening cause which absolved Unique from liability for Janice's injuries. In response, based on § 27-1-703(4), MCA, (1987), Janice filed her Motion in Limine to exclude from consideration by the jury argument or evidence of any conversation between Larry and Dr. Wallick that Wallick would keep the rear door locked during construction; that Dr. Wallick forgot to lock the door approximately one and one-half hours before Janice's fall; and that Dr. Wallick was solely or partially at fault with regard to Janice's fall. Janice's motion was briefed and argued, and, on the first day of trial was granted by the District Court.

Trial began in February 1994. Janice's attorney called Larry and elicited testimony to the effect that he (Larry) was concerned about the hazardous condition posed by the removal of the steps, that he discussed those concerns with Dr. Wallick in Janice's presence, that various measures could be taken to mitigate the danger, but that he (Larry) did nothing to secure the door. Pursuant to the District Court's order granting Janice's Motion in Limine, however, and despite Unique's offer of proof, neither Larry nor Wallick were allowed to detail their conversation about the necessity to barricade the rear door; that Dr. Wallick had refused to have the door barricaded; that Dr. Wallick had agreed to lock the door; and that Larry had relied on Dr. Wallick's statements in that regard as the reason why Unique did not take any measures to secure the door.

DISCUSSION

On appeal, Unique contends that because the District Court granted Janice's Motion in Limine, it was denied its right to a fair trial. Unique argues that the jury was precluded from hearing all of the facts as to how and why Janice's accident occurred and that it was unable to present factual support for its defenses that it was not negligent and that, even if it was, its negligence was not the proximate cause of Janice's injuries, Dr. Wallick's negligence being an independent, superseding and intervening cause.

Janice maintains that the District Court correctly granted her Motion in Limine and kept the offered argument and evidence from the jury because amendments to § 27-1-703, MCA, made by the 1987 legislature, specifically removed from consideration and determination by the fact finder any amount of negligence on the part of the injured person's employer to the extent that such employer had tort immunity under Montana's Workers' Compensation Act. We conclude that the District Court's application of § 27-1-703(4), MCA, to prohibit the offered testimony and evidence from being considered by the jury was correct.

The issue raised in this case is one of first impression. While this Court recently held certain portions of § 27-1-703(4), MCA, (1987) unconstitutional, *Newville v. State of Montana* (1994), ___ Mont. ___, 883 P.2d 793, our decision in that case did not address the language of the statute at issue here, nor is there any constitutional issue raised in this appeal with respect to that part of the statute. Rather, the issue here involves one of merely applying the clear and unambiguous requirements of the statute to the facts before the court.

[1] In pertinent part, § 27-1-703(4), MCA, (1987), provides:

> (4) ... However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government.

That language, along with other provisions, was added to § 27-1-703, MCA, by the 1987 Legislature as a part of its tort reform legislation. See *Newville*, 883 P.2d at 799.

There is nothing ambiguous or unclear about the statutory language at issue. The legislature has provided that the fact finder may not "consider or deter-

EXHIBIT 7
DATE 2-14-95
SB 212

mine any amount of negligence" on the part of the injured person's employer to the extent the employer has tort immunity under the Workers' Compensation Act.

[2] It is undisputed that Dr. Wallick was Janice's employer and that he is immune from tort liability for her injuries because she was covered by and received benefits under his workers' compensation insurance. See, Article II, Section 16, Constitution of the State of Montana and § 39-71-411, MCA. Unique, nevertheless, argues that it should be able to completely absolve its own liability by offering evidence, argument and instruction to the jury that it did not secure the rear door because Dr. Wallick said he would take care of it; because Dr. Wallick refused to allow Unique to barricade the door; because Dr. Wallick negligently failed to secure the rear door himself; and because Dr. Wallick's negligence was the proximate cause of Janice's injuries.

[3] Obviously, Unique can only prevail in that defense if the trier of fact is, first, allowed to "consider" evidence of Dr. Wallick's alleged negligent acts and omissions from testimony of what Dr. Wallick said he would do and from what he then actually did or failed to do, and, second, if the trier of fact is then allowed to "determine" from that evidence that it was Dr. Wallick's negligence, and not Unique's, that proximately caused Janice's injuries. That, of course, is precisely the sort of evidence that the statute expressly prohibits from going to the jury. Because Dr. Wallick is absolutely immune from tort liability for her injuries, *any* amount of his negligence which caused or contributed to Janice's injuries cannot be considered or determined by the jury. Dr. Wallick's negligence is simply not a part of the liability or damages equation.

[4] While the parties argue for and against the fairness of the statute and the rationale underlying its adoption, that is not the issue. Moreover, we have considered the authorities cited by Unique and do not find them persuasive. While Judge Battin's interpretation of the statutory language in *Weaselboy v. Ingersoll-Rand* (April 10, 1991) 10 Mont. Fed. Rpt. 41 differs from ours, we are not constrained to follow the interpretations of Montana's statutes by the federal judiciary, especially where the statutory language at issue has not been previously interpreted by this Court. The statutory prohibition is clear and unambiguous, and no argument has been advanced that the portion of the statute at issue is unconstitutional.

[5] Absent such a challenge, it is not the prerogative of this or of any other court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate. Accordingly, we are compelled to hold that the District Court correctly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

AFFIRMED.

CHIEF JUSTICE TURNAGE, JUSTICES GRAY, HUNT and WEBER.

WHAT THE MDTL AMENDMENT TO SB 212 WILL NOT DO

Based on literature already distributed by the Plaintiffs' Trial Lawyers Association (MTLA), it is expected that an argument may be made to the effect that the amendment proposed by MDTL will result in some form of threat to Montana employers. There is no such threat.

Under Montana law, an employer and its employees are absolutely immune from being sued for any negligent act which causes a workers' compensation accident. That law will remain unaffected by SB 212. Employers and their employees cannot be sued under SB 212 or under the MDTL proposed amendment.

All the amendment does is allow the jury to consider any negligence by the employer or a coemployee in determining the percentage of negligence attributable to the defendant being sued by an injured employee. The defendants in these cases, which are known as "third-party" actions, are usually contractors or product manufacturers. The amendment provides for a fair allocation of negligence to the defendant, with no monetary risk whatsoever to the employer or its employees. They cannot be named in the suit, nor will they be required to hire attorneys to defend themselves. Because of their immunity under the workers' compensation laws, they are treated under SB 212 as "nonparties." SB 212 expressly provides that any finding of negligence by a nonparty "is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty." This means that any decision made concerning the negligence of an employer or its employees is not binding on them. Instead, that decision is used only for purposes of allocating an appropriate share of negligence to the persons or entities who are actually parties in the lawsuit.

The overall purpose of the MDTL amendment is to insure that there is a fair allocation of negligence in negligence lawsuits. The only way that can be done is to allow the jury to consider the negligence of <u>all</u> of the persons who contributed to an accident. The jury should be told the truth about <u>all</u> of the acts of negligence by <u>all</u> of the participants in an accident. When the jury isn't told the truth about all of the negligent participants, you have results like the ***Unique Concrete*** case, where a cement contractor is being required to pay over $100,000 for an accident that was not caused by his negligence, but by the negligence of the injured party's employer.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 2/14/95
BILL NO. SB 212

Directors:
Wade Dahood
Director Emeritus
[illegible]te D. Beck
[illegible]abeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Montana Trial Lawyers ASSOCIATION

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

Officers:
Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

February 14, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to Senate Bill 212, which amends Sec. 27-1-703, MCA, but fails to correct the constitutional deficiencies in that statute.

Background. The Montana Supreme Court, in *Newville v. State of Montana Department of Family Services,* 51 St.Rep. 758 (1994), invalidated those "empty chair" portions of Montana's joint-and-several statute which (1) subjected so-called non-defendants to blame in Montana courts without the opportunity to defend themselves, and (2) required plaintiffs to defend those so-called non-defendants.

The quotations from *Newville* accompanying this testimony demonstrate that the Montana Supreme Court invalidated the statute ***because the "empty chair" was empty, not just because the "empty chair" needed new upholstery.*** For example:

- "We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs." (*Newville,* page 765)
- ". . . the due process clause contains a substantive component which bars arbitrary governmental actions *regardless of the procedures used to implement them*, and serves as a check on oppressive governmental action." (*Newville,* page 763)

Senate Bill 212. This bill mistakenly presumes (at page 1, line 11), "the basis of the holding [in *Newville*] was that the statute lacked certain procedural safeguards" which would otherwise have made the "empty chair" acceptable. Consequently, this bill mistakenly presumes that it can merely add certain procedural upholstery and thus furnish the courts of justice in Montana with "empty chairs" again. MTLA disagrees with

both presumptions.

Under Senate Bill 212, (1) so-called non-defendants ***will still be subjected to blame in Montana courts without the opportunity to defend themselves,*** and (2) plaintiffs ***will still be required to defend those so-called non-defendants.***

Far from correcting such constitutional defects, the procedural "safeguards" in SB 212 actually aggravate the injustice of an "empty chair" in several respects. Section 6(d) of the bill, for example, authorizes a real defendant to add a so-called non-party defendant *even after the statute of limitations has expired for that non-party,* depriving a plaintiff of any ability to add that non-party as an additional defendant. Nothing in the 1987 statute went so far.

Likewise, Section 6(b) of the bill--by providing that "[a] finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty"--indicates that (1) a finding of negligence of a nonparty is a presumptive or conclusive finding for purposes of the present action, and (2) in prior or subsequent actions which do not "involve" that nonparty (i.e., where the nonparty is again a nonparty), those findings of negligence may indeed be presumptive or conclusive evidence.

Finally, MTLA notes that the Montana Supreme Court in *Newville,* having declared the "empty chair" provision of Sec. 27-1-703, MCA, unconstitutional, then addressed the next question: whether the constitutional defect extended beyond the specific "empty chair" phrases. The Court said:

> "We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, nor was it an inducement to its enactment. We further conclude that the remainder of the statute is capable of being executed in accordance with the legislative intent." (*Newville,* page 766)

MTLA believes that the Legislature's enactment of SB 212, in light of the testimony of proponents of SB 212, will require the Montana Supreme Court when it again declares "empty chair" provisions unconstitutional, to also reconsider whether such provisions are indeed essential to the entire joint-and-several statute and thus whether the remainder of the statute can survive without them.

If MTLA can provide more information or assistance to the Committee, please notify me. Thank you again for this opportunity to oppose SB 212.

Respectfully,

Russell B. Hill, Executive Director

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 2/14/95
BILL NO. SB 512

**For every breach of trust,
whether it is for ox, for ass, for sheep,
for clothing, or for any kind of lost thing,
of which one says, "This is it,"
the case of both parties
shall come before the judges;
he whom the judges shall condemn
shall pay double to his neighbor.**

Exodus 22:9

**If a malicious witness rises against
any man to accuse him of wrongdoing,
then both parties to the dispute
shall appear before the Lord,
before the priests and the judges
who are in office in those days;
the judges shall inquire diligently,
and if the witness is a false witness,
and has accused his brother falsely,
then you shall do to him
as he had meant to do to his brother;
so you shall purge the evil
from the midst of you.**

Deuteronomy 19:16-20

WHAT--EXACTLY--DID THE MONTANA SUPREME COURT SAY IN *NEWVILLE V. STATE OF MONTANA?*

"While the listed reasons for enactment of comparative negligence tort reform legislation are valid governmental purposes, *we conclude that the Montana Legislature has acted arbitrarily and unreasonably in responding to this need. We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs.*" [emphasis added]

"We hold that the following portion of Sec. 27-1-703(4), MCA (1987), violates substantive due process:

> . . . persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. . . .

While we hold that the naming of "any other persons who have a defense against the claimant" *violates substantive due process where such persons are not parties,* we further emphasize that the reference in the statute to "any other persons who have a defense against the claimant" is so vague as to make its meaning impossible to understand." [emphasis added]

". . . the due process clause contains a substantive component which bars arbitrary governmental actions ***regardless of the procedures used to implement them,*** and serves as a check on oppressive governmental action." [emphasis added]

"As a result of our holding of unconstitutionality, *we have eliminated that portion of the statute which allowed an allocation of negligence to nonparties,* and in particular to nonparties who had been released from liability by the claimant, nonparties who were immune from liability to the claimant, and any other nonparties who have a defense against the claimant." [emphasis added]

"Substantive due process primarily examines the underlying substantive rights and remedies to determine *whether restrictions, such as those placed on both remedies and procedures in this case,* are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute." [emphasis added]

"In the case before us, plaintiffs contend that Sec. 27-1-703, MCA (1987), *arbitrarily prejudices plaintiffs by requiring them to exonerate nonparties.* They contend [1] there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; ***and*** [2] that *there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties,* particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons. ***These procedural problems*** [plural] ***form the basis for our holding that Sec. 27-1-703, MCA (1987), in part violates substantive due process.***" [emphasis and brackets added]

"We conclude that Sec. 27-1-703(4), MCA (1987), *unreasonably mandates an allocation of percentages of negligence to nonparties* without any kind of procedural safeguard. . . . *Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties.*" [emphasis added]

"We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), ***is not essential to the integrity of the statute,*** nor was it an inducement to its enactment." [emphasis added]

NEWVILLE *SAYS THE "EMPTY CHAIR" IS EMPTY--*
SB 212 SAYS IT JUST NEEDS NEW UPHOLSTERY!

STRAIGHT TALK ABOUT SB 212

Not Just a Bill--A Bill of Goods

Proponents of Senate Bill 212 describe it as a simple procedural change to "conform" with the Montana Supreme Court's *Newville* decision. ***They're dead wrong.*** To the contrary, SB 212 runs counter to *Newville* and licenses lawyers and insurance companies to run roughshod over Montanans in court.

Encourage Settlements, Not Lawsuits

SB 212 should have been titled, "The Clogged-Court Act of 1995." It will render prompt settlements nearly impossible. Even simple disputes will instantly "morph" into complex multi-party monsters under SB 212, confusing to everyone but lawyers. The so-called "procedural improvements" in SB 212 guarantee that more Montanans will be sued. Ask proponents of the bill--they know. Settlements with individual defendants, even those only marginally related to the lawsuit, will become too risky for lawyers on all sides to consider. So under SB 212, trials will require more litigants, more lawyers, more time--***and more money.***

The Guilty Pay Less, Montana Picks Up the Tab

Existing Montana law encourages personal accountability. Not so SB 212. *No innocent person has ever paid a dime of compensation under Montana's joint and several liability laws.* Every defendant who pays has first been found guilty of negligence--negligence which has inflicted medical bills, lost income, disability or death upon some Montanan. But SB 212 will allow the careless to evade their responsibilities and pay less for the medical bills and lost wages they caused.

Who picks up the tab? Sometimes the injured person, but most often ***our overburdened Medicaid and welfare systems.*** In effect profitable private insurance companies want to evade legitimate claims by *picking the "deep pockets" of the State of Montana and Montana taxpayers.* SB 212 says they can.

Woe to "Non-Party" Defendants--Like You

Under SB 212, you or your business can be trapped as a "non-party" defendant with no way to defend yourself. Your insurance company won't help, because you aren't really being sued. The judge can't help, because rules of court don't allow "non-motions" by "non-parties" who seek "non-dismissal" merely to protect their good name. And skilled defense lawyers for other defendants certainly won't help, since they ***want*** to blame you.

A judge or jury that never saw your face, that only heard one side, can blame you. And if it does, you will read about your conviction in the morning headlines. You will answer calls from family, friends, customers, patients, and clients "just wondering what's up." How will you explain? Just as importantly, if this happens to one of your constituents, how will you explain a vote in favor of SB 212?

DON'T BE FOOLED BY THE "EMPTY CHAIR"--VOTE <u>NO</u> ON SB 212

EXHIBIT 9
DATE 2-14-95
SB 212

JEANNINE NEWVILLE and DAMON GANNETT, Co-Guardians ad litem for R.M., a minor, Plaintiffs, Appellants and Cross-Respondents,

v.

STATE OF MONTANA, DEPARTMENT OF FAMILY SERVICES, an agency of the state of Montana, Defendant, Respondent and Cross-Appellant.

No. 92-310.
Submitted March 16, 1994.
Decided August 29, 1994.
51 St.Rep. 0758.
___Mont.___.
___P.2d___.

NEGLIGENCE - CONSTITUTIONAL LAW - STATUTES - EVIDENCE - JURY - DAMAGES - TORTS - LOCAL GOVERNMENT. Plaintiffs appealed from a jury verdict in negligence action concerning severe injuries inflicted upon minor child by her foster father while in his care pending an adoption, which verdict attributed negligence under Montana comparative negligence statute to state department of family services (30%), foster mother (35%) and a professional counselor (35%). The Supreme Court held:

1. NEGLIGENCE. Where plaintiffs have established they could suffer economic loss if a percentage of negligence were attributed to unrepresented parties, plaintiffs have standing to assert the rights of the unrepresented parties.

2. CONSTITUTIONAL LAW. Theory underlying substantive due process reaffirms fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions and serves as a check on oppressive governmental action.

3. CONSTITUTIONAL LAW. Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary when balanced against purpose of legislature in enacting statute.

4. CONSTITUTIONAL LAW. To satisfy guarantees of substantive due process, a statute must be reasonably related to a permissible legislative objective.

5. CONSTITUTIONAL LAW - STATUTES. Section 27-1-703(4), MCA (1987), unreasonably mandates allocation of percentages of negligence to nonparties without any kind of procedural safeguard.

6. CONSTITUTIONAL LAW - STATUTES. Portion of 27-1-703(4), MCA (1987), stating "persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant" violates substantive due process.

7. CONSTITUTIONAL LAW - STATUTES. If an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while the part which is unconstitutional is stricken and rejected, unless such provision is necessary to the integrity of the statute or was an inducement to its enactment.

8. CONSTITUTIONAL LAW - STATUTES. Unconstitutional portion of 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, was not an inducement to its enactment and remainder is capable of being executed with the legislative intent.

9. EVIDENCE - NEGLIGENCE. In Montana, expert testimony is required as to the standard of care of professional and as to the professionals violation of that standard of care before trier of fact may find such professional negligence.

10. EVIDENCE. District court erred in permitting counselors name to be listed on special verdict form when standard of care for a professional counselor had not been established by evidence and there were no specific jury instructions as to professional standard requirement.

11. EVIDENCE. Where no causal connection was ever made establishing a medical link between actions of biological parents and childs present condition, district court abused its discretion in admitting evidence concerning biological parents and in allowing department to comment on such evidence during closing argument.

12. JURY. There is no reversible error in the giving or refusing of certain instructions, where jury instructions, viewed in their entirety, state the correct law applicable to the case.

13. JURY. Section 41-3-201 requires the department of family services to notify county attorney of a report of child abuse, and court erred in refusing to give offered jury instruction relating to that duty.

14. DAMAGES - JURY. Amount of damages awarded is solely within province of jury and, although jury is not given carte blanche in that regard and there must be some substantial evidence to sup-

port verdict, jury is not bound by the testimony of experts.

15. DAMAGES - JURY. Court erred in instructing jury by failing to include provision that the only amounts to be adjusted to present cash value are future earnings and future medical costs.

16. DAMAGES. As required by 25-9-402, MCA, special verdict form should state whether amount of future damages had been reduced to present value by jury.

17. TORTS - LOCAL GOVERNMENT. Governmental entity may be immune from tort liability if tort was committed while entity was performing a quasi-judicial function even when governmental unit is not characterized as a quasi-judicial entity.

18. TORTS - LOCAL GOVERNMENT. Core determination for immunity to apply to the function of the agency is that it be quasi-judicial rather than administrative or ministerial.

19. TORTS - LOCAL GOVERNMENT. Where department is required by statute to license and train foster care providers and to investigate adoptive homes, department was, at all times leading up to the tort sued upon, acting ministerially.

20. TORTS - LOCAL GOVERNMENT. Although immunity may apply to the exercise of a quasi-judicial function where there is no statutorily-designated quasi-judicial board, department in this case was not carrying on investigation of the sort which is granted immunity, such as part of a contested hearing.

21. TORTS - LOCAL GOVERNMENT. Department was not acting in quasi-judicial role where no contested case or adversarial type of proceeding was involved and departments actions were not discretionary but rather were mandated by statute and were ministerial and administrative in nature.

22. TORTS - LOCAL GOVERNMENT. Department is not granted immunity by statute granting immunity for persons required to report and investigate child abuse; statute is intended to protect individuals such as teachers, doctors and psychologists who are required to report suspected abuse.

Affirmed in part, reversed in part and remanded.

**Appeal from District Court of Gallatin County.
Eighteenth Judicial District.
Honorable John Warner, Judge.**

For Appellant: **Monte D. Beck, John J. Richardson**, Beck Law Offices, Bozeman; **Larry A. Anderson, Howard F. Strause**, Great Falls.

For Respondent: **R.H. Bellingham, T. Thomas Singer**, Moulton, Bellingham, Longo and Mather, Billings.

For Amci: **Robert J. Phillips, John E. Bohyer**, Phillips & Williams, Missoula; **Randy J. Cox**, Boone, Karlberg & Haddon, Missoula (Montana Defense Trial Lawyers Association)

L. Randall Bishop, Jarussi & Bishop, Billings; **Donald W. Molloy**, Billings; **David R. Paoli**, Missoula (Montana Trial Lawyers Association)

JUSTICE WEBER delivered the Opinion of the Court.

This is an appeal by the plaintiffs from a jury verdict arising out of the Eighteenth Judicial District Court, Gallatin County, in favor of plaintiffs' ward, R.M., in a negligence action concerning severe injuries inflicted upon R.M. by her foster father while in his care pending an adoption. The jury attributed negligence under Section 27-1-703, MCA, Montana's comparative negligence statute, to the State of Montana Department of Family Services (30%), the foster mother (35%) and a professional counselor who had treated the foster mother and father over a period of years (35%). The foster father was not listed on the special verdict form because the District Court found his conduct was intentional and not negligent. Amici curiae Montana Defense Trial Lawyers and Montana Trial Lawyers Association also presented the Court with arguments concerning constitutional issues. We affirm in part, reverse in part and remand for a new trial.

Plaintiffs now seek a new trial solely against the State of Montana Department of Family Services (the Department), presenting the Court with numerous issues, as does the Department in its Cross-Appeal, which we have restated as follows:

I. Do the plaintiffs have standing to assert the rights of unrepresented third persons included on the verdict form?

II. Is Montana's comparative negligence statute, Section 27-1-703(4), MCA, unconstitutional as amended by the 1987 legislature?

III. Did the District Court err in allowing the jury to allocate a percentage of negligence to Edna Goodwin, who settled with the plaintiffs prior to trial, when no evidence had been introduced to establish the standard of care for a professional counselor?

IV. Did the District Court err in admitting evidence concerning R.M.'s biological parents?

V. Did the District Court err in instructing the jury?

VI. Is the Department immune from tort liability for its failure to protect R.M.?

VII. Who is to be included on the special verdict form if there is a subsequent trial in this action?

The plaintiffs in this case are co-guardians ad litem for R.M., an American Indian child born to a 16-year-old mother. R.M.'s natural mother left R.M. in the custody of her grandmother prior to the age of seven months and could not be located when R.M. was subsequently removed from her grandmother's home by the police at the age of seven months. Because R.M.'s mother could not initially be found and her father was unavailable, the court appointed a guardian ad litem for her and placed her in the temporary custody of the Department.

In addition to R.M.'s birth mother being under age, she and the birth father had problems with intellectual functioning and with drug and alcohol abuse. R.M.'s birth mother had dropped out of school in the 7th grade and had an I.Q. of 69. The parental rights of both R.M.'s biological parents were terminated in Yellowstone County, giving the Department permanent custody of R.M. in October 1987.

After obtaining custody of R.M., the Department placed her in a series of foster homes. By the time she was four years old, she had been in seven foster homes, including the home of Dennis and Martha Kuipers. The Department removed R.M. from some of these homes because of allegations of physical abuse, sexual abuse, or neglect.

Although R.M. was available for adoption during the time she was being placed in foster care, she was not an easy child to place because of behavioral problems of the type caused by abuse. Adoptive placement was further complicated because any adoptive placement had to comply with the provisions of the Indian Child Welfare Act 25 U.S.C. Section 1915.

Following a series of events beginning when Dennis Kuipers heard from a friend that R.M. was available for adoption, the Department placed R.M. in foster care with Dennis and Martha Kuipers (the Kuipers) of Belgrade, Montana, with the intent that the Kuipers would adopt her if they were qualified by the Department as adoptive parents. This was done in September 1988 after the Department investigated the Kuipers. This placement was referred to by the Department as a "fos/adopt" placement.

Dennis Kuipers is of American Indian ancestry and thus better qualified to adopt R.M. under the Indian Child Welfare Act than a non-Indian person. Dennis Kuipers himself had been adopted by a non-Indian family at a young age after being abused, neglected and abandoned. He wanted to adopt R.M. because of the positive experience of his own adoption. The Kuipers were foster parents at all times during this action as the adoption was never completed.

Testimony was presented at trial which indicated that the Department did not conduct a proper investigation prior to placing R.M. in the Kuipers' home. For example, in response to a request for recommendation for adoption, the Kuipers' counselor, Edna Goodwin, wrote that Dennis Kuipers was "working on his issues of rage" and that "there was previously an issue of abuse by Dennis to his wife and to one of their two children." The Department did not contact Edna Goodwin about her comments in her letter despite permission from the Kuipers to do so. Other testimony was presented which indicated that the Department also did not follow up on other reports of abuse or check its own records for reports of abuse by Dennis Kuipers.

Ed Neuman, a Department employee, supervised the "fos/adopt" placement during the two months after R.M. was placed with the Kuipers. On October 2, 1988, just three weeks after R.M. was placed in the Kuipers' home, witnesses stated that Dennis Kuipers beat R.M. outside the Rax restaurant in Bozeman, Montana, partly in view of restaurant patrons and partly concealed within the family van. Dennis Kuipers became upset with R.M. because she had wet her pants. When he brought R.M. into the restaurant, she had black marks on her cheeks, and was described as having a fixed stare as though she were in shock. One witness testified that she looked like a "zombie."

These descriptions came from two couples who observed the incident from a location inside the Rax restaurant very near to where the Kuipers' van was parked. One witness, Salvatore Provenzano, telephoned the Bozeman police from the restaurant to report the incident. Salvatore Provenzano and his wife, Joy Provenzano, went to the police station at the request of the officers to provide the Bozeman Police Department with a written report. By the time the officers had arrived at the restaurant, however, the other witnessing couple, the Stewarts, had left the restaurant. The Stewarts provided the Bozeman police with a written statement later that same week.

Two officers responded to Salvatore Provenzano's report and came to the restaurant to investigate. Officer Linda Sanem took Martha Kuipers aside and asked her numerous questions. During that interview Martha Kuipers was holding R.M. Martha Kuipers believed at that time that no abuse had occurred. She apparently had been in the rest room and also behind a partition in the restaurant ordering food during the abuse incident. She testified that up until the time o

Dennis Kuipers' plea agreement when he admitted to hitting R.M. outside the restaurant, she believed that no abuse had occurred there.

At the restaurant, while holding R.M., Martha Kuipers convinced Officer Sanem that nothing had occurred. Testimony at trial indicated that because R.M.'s hair was long, thick and dark, it may have hidden physical signs of abuse. Other testimony was presented that any initial redness may have disappeared by the time the officers arrived and any subsequent bruising may not have been present yet.

Officer Sanem testified that R.M. had bruises on her face but they looked like they were not newly-inflicted. She further testified that since none of the witnesses actually saw Dennis Kuipers hit R.M. – they only saw his open hand and then his fist going up and down inside the van -- and there were no apparent newly-inflicted bruises, the officers did not have probable cause to arrest Dennis Kuipers for assault. She testified that she felt uncomfortable about not being able to do anything further at that time. At the time of the investigation, the officers did not have the written reports from the Provenzanos and the Stewarts and had only briefly spoken to Salvatore Provenzano over the phone when he reported the incident. Sanem further testified:

> Unless there's obvious signs of violence, you know, physical injuries, we have to rely on what witnesses tell us as to what actually occurred. And one point of fact in this matter, that he, in fact, did not see the fist actually hit the child, does not constitute an assault.
>
> From our point of view, we have to look at it from a criminal standpoint and in order for it to be an assault under that statute. If there's no sign of an injury, then we have to -- have to have actually have that contact, and he couldn't say that he actually saw that.

Officer Sanem also testified that she believed Martha Kuipers' statement that the child had bruises from falling down a lot lately and that the Department was aware of that. Nonetheless, Officer Sanem told Martha Kuipers that the incident would be referred to the Department. Officer Sanem further testified that she has since had further law enforcement training and would not have made the same assessment of the Rax incident if she had had the training prior to that time.

Officer Sanem testified that she was "very suspicious about the bruises, but it was obvious to [her] that that hadn't just occurred and it was an incident that obviously needed to be further investigated." She further testified that the officers had two options -- to refer the incident to the Department or to take immediate custody of the child. When she observed R.M., it did not appear that she had been crying and she felt that they did not have cause to take her. At that time, she had not investigated any other abuse cases in which a child had been hurt within the previous 15-20 minutes. Officer Sanem did not call the Department that day and was off duty the following day; she left that duty of reporting the incident to the Department to Officer Paul Erickson, the other officer who was also at the Rax restaurant to investigate the report.

Officer Erickson interviewed Dennis Kuipers at the Rax restaurant and was convinced by him that he had not hit R.M., but rather may have been waving a diaper up and down or something like that. Officer Erickson, however, also advised Dennis Kuipers that the incident would be referred to the Department and more thoroughly investigated by them. Officer Erickson testified that he had been "fooled" by Dennis Kuipers.

However, the matter was referred to the Department for investigation prior to the close of the police investigation. The remainder of the police investigation included getting written statements from the Provenzanos and the Stewarts. No charges were made against Dennis Kuipers as a result of that investigation.

As previously stated, Ed Neuman supervised the placement of R.M. with the Kuipers on behalf of the Department. The Kuipers called Neuman to report the Rax incident to him later that afternoon because the police officers had told them that the Department would be notified. Dennis Kuipers' discussion with Neuman minimized the seriousness of the incident and he denied hitting R.M.

Officer Erickson reported the Rax incident to the Department for further investigation. The police report actually states that R.M. was injured and an investigation was pending. The Department did investigate the incident but trial testimony demonstrated that the Department's investigation was very limited. The investigator did not search the Department's own files to check for prior reported incidents of abuse by Dennis Kuipers. That search would have provided information about the prior incident of abuse which had been investigated by the Department. In addition, the Department did not report the matter to the County Attorney as will be subsequently discussed.

One month later, on November 1, 1988, Dennis Kuipers severely beat R.M. As a result of this beating, R.M. had bruises over most of her body and she was hospitalized for two weeks. During the hospitaliza-

EXHIBIT 9
DATE 2-14-95
SB 212

tion, R.M. was initially in a coma. She also had seizures and was paralyzed on one side of her body. A craniotomy had to be performed to relieve acute fluid pressure on her brain. Medical experts testified at the trial that R.M. had lost substantial brain tissue as a result of the beating and that the damages were irreversible.

The plaintiffs initially sued Dennis Kuipers, Martha Kuipers, Edna Goodwin (the Kuipers' counselor), and both the Department and its employee, Ed Neuman. The claim against Neuman was dismissed by the court. Both Dennis Kuipers and Edna Goodwin settled with the plaintiffs prior to trial and were dismissed pursuant to their respective agreements with the plaintiffs following the settlement conference. The trial proceeded against the remaining defendants -- Martha Kuipers and the Department.

The special verdict form presented to the jury included the Department, Martha Kuipers and Edna Goodwin. Dennis Kuipers was not included on the special verdict form because the District Court ruled that his intentional conduct made him jointly and severally liable for all damages and that Section 27-1-703(4), MCA, does not permit apportionment of liability for intentional conduct.

The jury awarded total damages of $637,480, apportioning negligence comparatively -- 30 percent to the Department, 35 percent to Martha Kuipers and 35 percent to Edna Goodwin. Subsequent to the trial, Martha Kuipers settled with the plaintiffs and has been dismissed with prejudice, leaving the Department as the sole defendant in this negligence action.

ISSUE I: Standing.

Do the plaintiffs have standing to assert the rights of unrepresented third persons included on the verdict form?

As a threshold issue, we address the Department's argument that plaintiffs do not have standing to challenge the constitutionality of Section 27-1-703, MCA, because by doing so they are not asserting their own constitutional rights, but rather the rights of unrepresented third parties such as settling parties and unsued tortfeasors. Although this opinion does not address the rights of unrepresented parties in the context of determining whether they have been denied procedural due process or equal protection, and although our ruling on substantive due process relates to plaintiffs primarily, we do agree with plaintiffs that they have standing to assert the constitutional rights of such third parties.

Plaintiffs correctly argued that their own potential economic loss gives them standing to assert the rights of third parties. They argued that unrepresented parties included on the verdict form can diminish a named defendant's portion of negligence below 50 percent, thereby making that defendant only severally liable, and that any defendants still in the action had the power to attribute blame to unrepresented tortfeasors, thereby reducing the potential damage award to less than 100 percent because plaintiffs would be unable to collect damages from unsued tortfeasors. These results could affect a totally innocent plaintiff such as R.M. in the same manner as they could affect a plaintiff with any contributory negligence up to 50 percent.

We considered a similar issue in *Belth v. Bennett* (1987), 227 Mont. 341, 349, 740 P.2d 638, 643, where this Court held that a state agency's records of insurance companies were not open to public inspection. The Court also concluded that because there was a potential economic loss to insurance companies as a result of suits by insurance consumers, the companies had a potential economic injury sufficient to establish standing. *Belth*, 740 P.2d at 641. Also, in *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 443, 649 P.2d 1283, 1288, we allowed the city to assert the privacy rights of its employees because of potential economic injury to the city from possible lawsuits against it by its employees if it divulged personal information about its employees without their consent. Both *Belth* and *Montana* Human Rights Div. held that a party facing potential economic injury may assert the constitutional rights of others.

[1] We conclude the plaintiffs here have established they could suffer economic loss if a percentage of negligence were attributed to unrepresented parties. We further conclude the plaintiffs have established a standing sufficient to assert the rights of the unrepresented parties such as settling parties and unsued tortfeasors.

We hold plaintiffs have the right to raise constitutional issues relating to Section 27-1-703, MCA, which affect the rights of unrepresented third parties.

ISSUE II: Constitutional Issues.

Is Montana's comparative negligence statute, Section 27-1-703, MCA, unconstitutional as amended by the 1987 legislature?

The plaintiffs contend that Section 27-1-703, MCA, violates the constitutional guarantees of procedural and substantive due process and equal protection and thus a new trial is required in this case. As discussed below, the Court concludes that Section 27-1-703(4), MCA, violates substantive due process. As a result,

the Court declines to address the other constitutional issues.

This case represents constitutional challenges to major changes in Section 27-1-703, MCA, which were enacted by the 1987 Montana Legislature. Section 27-1-703, MCA, was a major vehicle for tort reform enacted by the Montana Legislature in response to demands from numerous factions in this state. That section concerns the determination of liability when there are multiple defendants involved in an action based upon negligence. Section 27-1-703, MCA (1987), as amended by the 1987 legislature, is set forth in its entirety in the appendix to this opinion, as is its predecessor, Section 27-1-703, MCA (1985).

The 1987 Senate Judiciary Committee minutes indicate that Senate Bill 51 (SB 51), which amended Section 27-1-703, MCA, was patterned after a bill in Washington state. That bill was drafted as an attempt to change Washington's comparative negligence statute and was intended to match liability for damages to fault of each of the parties involved in a tort action, excepting only the fault of employers and co-employees to the extent of their tort immunity under the Workers' Compensation Act. The stated aim of SB 51 was to protect "deep pocket" defendants such as municipal and county governments when they were faced with minimal percentages of negligence assigned to them by juries but nonetheless required to pay large judgments under joint and several liability principles.

As pointed out by Victor E. Schwartz in his comparative negligence treatise, a substantial minority of states have now abolished or severely limited the common law doctrine of joint and several liability:

> In the mid-1980's, a significant number of states changed the joint liability rule, in part, because of growing awards against "deep pocket" defendants who might be only peripherally responsible for plaintiff's injuries. A few states cut the Gordian knot by abolishing the doctrine outright or limiting it to those who have acted in concert. Nevada abolished it except in cases involving strict liability, intentional torts, toxic wastes, concerted acts, or products liability. A number of other states have attempted to serve competing goals of fairness and loss distribution by adopting systems for imposing joint liability only for "noneconomic" damages or for certain percentages of fault. Some states have adopted a combination of exceptions.

V. Schwartz, *Comparative Negligence* Section 16.4 (2d ed. Supp. 1993).

The major changes in Section 27-1-703, MCA (1987), related to joint and several liability and the addition of subsection (4) mandating the trier of fact to consider the negligence of various described persons and parties in order to determine liability and apportion the percentage of liability among all such persons. Section 27-1-703(4), MCA (1987), provides in pertinent part:

> (4) ... For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons...

The above-quoted subsection (4) is new and takes the place of the following from the prior statute:

> Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons.

[2,3] The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. Even though a plaintiff may have no property or liberty interest grounded in state law which is protected from arbitrary government action, such action still may be subject to review under substantive due process. Substantive due process primarily examines the underlying substantive rights and remedies to determine whether restrictions, such as those placed on both remedies and procedures in this case, are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute. *See* J. McGuinness and L. Parlagreco, *The Reemergence of Substantive Due Process As A Constitutional Tort: Theory, Proof, and Damages*, 24 New Eng. 1129, 1133 (1990).

Substantive review for due process violations applies to enactments which affect individual constitutional rights, and may thus include a review of an enactment's inherent procedural fairness. Rotunda & Nowak, 2 *Treatise on Constitutional Law: Substance and Procedure* Section 15.4 (2d ed. 1992).

In addressing a substantive due process challenge in *Harrison v. Chance* (1990), 244 Mont. 215, 225, 797 P.2d 200, 206, we referred to our analysis in *Linder v. Smith* (1981), 193 Mont. 20, 28-29, 629 P.2d 1187, 1192, stating: "The legislature is free to impose rea-

sonable procedural requirements on the available remedies so long as those requirements have a rational basis." Although the *Linder* Court held there was no substantive due process violation on the basis of the issues as raised by the parties, it did excise a portion of the statute on substantive due process grounds, stating:

> We find claimant's due process contentions to be without merit, particularly when considered in view of the limited effect which the panel's decision can have in Montana in subsequent litigation. We do address one issue, though, which was not initially raised by the parties to the litigation, but which came to our attention during the hearing in this case: Section 27-6-704(2), MCA, provides that "[no] statement made by any person during a hearing before the panel may be used as impeaching evidence in court." In order to uphold the constitutionality of the panel act, we determine that this section must be severed from the act. It is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of a witness testifying against them. We are mindful that this provision was enacted to aid the fact-finding by the panel and to preserve the confidentiality of the proceedings. But we cannot say that a litigant will receive a full and fair hearing if he is unable to fully cross-examine in court the witnesses that testified in the prior hearing.

Linder, 629 P.2d 1192.

[4] In *Raisler v. Burlington N. Ry. Co.* (1985), 219 Mont. 254, 263, 717 P.2d 535, 541, this Court stated, "Substantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation." Its essence is that the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual. *Raisler*, 717 P.2d at 541. Therefore, in order to satisfy guarantees of substantive due process, a statute enacted by the legislature must be reasonably related to a permissible legislative objective. *Raisler*, 717 P.2d at 541. *See also Ball v. Gee* (1990), 243 Mont. 406, 412, 795 P.2d 82, 86, citing *In re C.H.* (1984), 210 Mont. 184, 194, 683 P.2d 931, 936.

In *Montana Milk Control Bd. v. Rehberg* (1962), 141 Mont. 149, 158-59, 376 P.2d 508, 514, this Court determined that substantive due process was not violated by legislation which allowed the State to control the retail price of milk and determined that the legislation was reasonably related to the permissible legislative purpose of ensuring an adequate supply of wholesome milk to the citizens of Montana. More recently, in *In the Matter of the Adjudication of the Yellowstone River* (1992), 253 Mont. 167, 179, 832 P.2d 1210, 1217, we stated that the State's regulatory power over adjudicating water rights must be exercised consistent with principles of substantive due process:

> A statute must be reasonably related to a permissible legislative objective to satisfy substantive due process guarantees.... The 1972 Montana Constitution mandates that the legislature "establish a system of centralized records." There can be no doubt that Section 85-2-226, MCA, was enacted for a permissible legislative objective.
>
> However, the appellants challenge whether ... Section 85-2-226, MCA, is reasonably related to the objective of adjudicating water rights. It is contended that ... [Section] 85-2-226, MCA, ... fails to be reasonably related to these objectives, because its operation results in the elimination of existing water rights. (Citations omitted.)

In *Matter of Yellowstone River*, 832 P.2d at 1217, we ruled that the challenged statute did not violate substantive due process in that it was a reasonable means of "compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims." The statute's filing requirement was "neither burdensome, unreasonable nor unrelated to the legitimate and proper legislative objectives." *Matter of Yellowstone River*, 832 P.2d at 1217. We further noted that neither the Supreme Court nor other states addressing the constitutionality of statutes requiring filing had found the filing requirement to be more than a minimal burden. *Matter of Yellowstone River*, 832 P.2d at 1217.

Although most of the challenges brought to this Court which have been grounded in substantive due process have failed, we have ruled that substantive due process was violated by a restrictive covenant in *Town & Country Estates Ass'n v. Slater* (1987), 227 Mont. 489, 493, 740 P.2d 668, 671. The restrictive covenant which violated substantive due process in *Town & Country Estates* allowed a Design Review Committee to disapprove house plans and prevent construction of homes in the subdivision. We held that the covenant was vague to a degree that violated substantive due process and was enforceable only when used in connection with some general plan or scheme. *Town & Country Estates*, 740 P.2d at 671.

In *Town & Country Estates*, the houses already built in the subdivision were each unique in design and demonstrated a "cacophony of styles" with a "hybrid mix of traditional, Tudor, ranch, and contemporary" with the only common design characteristics being a 2400 square foot size minimum and a shake

roof. *Town & Country Estates*, 740 P.2d at 671. The Court stated:

> If the subdivision itself lacks consonance, the Slaters' plan cannot lack harmony. In the context of [Town and Country Estates] and Slaters' plan, the term "harmony of external design" lacks the mutuality of obligation central to the purpose of a restrictive covenant. In view of the wide variety of designs, no one seemed burdened by the covenant except the Slaters.
>
> ...
>
> The approval or disapproval of plans by the [Design Review Committee] must be based upon an objective design standard. Without a quantifiable standard to guide them, the decision ... is unenforceable... . We hold that the Slaters' house fell well within the broad architectural spectrum of [Town & Country Estates] houses. *Applied to the ... subdivision and the Slaters' plan, we hold that Article V lacks sufficient objectivity, and is vague to a degree that denies substantive due process to the Slaters.*

Town & Country Estates, 740 P.2d at 671. (Emphasis supplied.)

In the case before us, plaintiffs contend that Section 27-1-703, MCA (1987), arbitrarily prejudices plaintiffs by requiring them to exonerate nonparties. They contend there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; and that there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties, particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons. These procedural problems form the bases for our holding that Section 27-1-703, MCA (1987), in part violates substantive due process.

[5] We conclude that Section 27-1-703(4), MCA (1987), unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims. It imposes a burden upon plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury. Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties.

We note that other states have enacted tort legislation allowing the inclusion of nonparties. Colorado, as an example, allows the inclusion of nonparties when apportioning fault, but only when notice has been given by the defendant within 90 days of commencement of the action. *See* Colo. Rev. Stat. Section 13-21-111.5 (1987). Indiana requires a defendant to assert a nonparty defense and to bear the burden of proof of that defense if the defense is asserted as part of an answer filed more than 45 days prior to the running of the statute of limitations on a claim against a nonparty. *See* Ind. Code Section 34-4-33-10 (1985). Like Indiana, Kansas places the burden of bringing in other parties, including those who have settled, on the defendant. *Glenn v. Fleming* (Kan. 1987), 732 P.2d 750, 756. Although Kansas has abolished joint and several liability altogether, it does not allow apportionment of percentage of total damages to any person who is not a party. *See* Kan. Stat. Ann. Section 60-258a(d) (1977). The establishment of the nonparty defense in Indiana has brought many questions about the definition of "nonparty" and the procedural mechanisms for bringing in additional defendants. Schwartz, *Comparative Negligence* Section 16.5 (2d ed. 1986 & Supp. 1993).

Numerous other comparative negligence statutes -- although rarely similar to an act of another state -- include some type of procedural safeguard for plaintiffs, defendants and nonparties. Ohio's tort reform law, for example, limits allocation of negligence to parties before the court. Schwartz, *Comparative Negligence* Section 16.5 (2d ed. Supp. 1993); Ohio Rev. Code Ann. Section 2315.19(B)(4) (1991). New Mexico allows settling defendants to be called as witnesses and allows discovery regarding such witnesses as if they remained in the action. *Wilson v. Gillis* (N.M. Ct.App. 1986), 731 P.2d 955, 958.

We have noted some of the procedural safeguards provided by other jurisdictions to emphasize that Montana's statute provides none of these protections. Our review of the comparative negligence statutes from other jurisdictions does not provide much help in the present case, however. Nearly every state has a unique statute with nuances which make its case law interpreting the statutes of little help to other courts.

We have previously mentioned that SB 51 was patterned after Washington state's statute. Yet SB 51 is substantially different from the 1986 enactment of Wash. Rev. Code Ann. 4.22.070, which is also set forth in the appendix to this opinion. A striking difference is that the Washington statute preserved joint and several liability for innocent plaintiffs. In contrast, Section 27-1-703, MCA (1987), treats all plaintiffs alike, lumping totally innocent plaintiffs -- like R.M.

EXHIBIT 9 766
DATE 2-14-95
SB 212

in this case -- with those plaintiffs whose comparative negligence may be as much as 50 percent. The effect of Section 27-1-703, MCA (1987), is to diminish plaintiffs' ability to collect 100 percent of damages in situations like the present case. Where the trier of fact attributes less than 51 percent of the negligence to each person on the verdict form, plaintiffs may be unable to collect for the portion of negligence attributable to judgment-proof defendants, immune tortfeasors, or other persons who may be included on the verdict form but who have not been a part of the action.

Such was the case with the persons listed on the special verdict form in the present case. Edna Goodwin was an unrepresented nonparty on the basis of her settlement prior to trial. Although Goodwin settled prior to trial and was no longer a party, she nonetheless was included on the verdict form as a settling party pursuant to Section 27-1-703(4), MCA. No attorney represented Goodwin's interests at trial and as a result, it is possible that the application of percentage of negligence was higher than would have been appropriate had the facts as to her case been presented by her own counsel.

None of the parties introduced evidence relating to the standard of care of a professional counselor. Goodwin was included on the verdict form as required by Section 27-1-703(4), MCA, without any instruction to the jury as to the proper standard of care for a professional counselor. On the verdict form the jury allocated 35 percent of the negligence to Ms. Goodwin, 35 percent to Mrs. Kuipers and 30 percent to the Department. Section 27-1-703(5), MCA, provides that if a party is found to be less than 50 percent negligent, that party is liable for contribution only up to the percentage of negligence attributed to him. As a result, under the verdict given, if any party is unable to pay the full amount of the judgment against that party, there will then be an inability on the part of the plaintiffs to collect all damages. *See State ex rel. Deere & Co. v. District Court* (1986), 224 Mont. 384, 730 P.2d 396, for its treatment of joint and several liability prior to the 1991 enactment of Section 27-1-703(5), MCA.

In many jurisdictions -- some mentioned above -- comparative negligence statutes allow an apportionment of liability to immune parties and settling parties. However, these jurisdictions have procedural aspects which provide for notice to plaintiffs, specific burdens of proof, and other procedures for safeguarding the rights of all involved -- parties and nonparties alike. Consideration of these procedural protections should have been considered by the Montana Legislature at the time of the enactment of the statute.

While the listed reasons for enactment of comparative negligence tort reform legislation are valid governmental purposes, we conclude that the Montana Legislature has acted arbitrarily and unreasonably in responding to this need. We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs.

[6] We hold that the following portion of Section 27-1-703(4), MCA (1987), violates substantive due process:

> ... persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. ...

While we hold that the naming of "any other persons who have a defense against the claimant" violates substantive due process where such persons are not parties, we further emphasize that the reference in the statute to "any other persons who have a defense against the claimant" is so vague as to make its meaning impossible to understand.

This raises the question as to whether the above holding renders the entire statute unconstitutional. In the enactment of SB 51, the 1987 Montana Legislature included the following "severability clause":

> Section 3. **Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.
>
> Chapter 505, 1987 Mont. Laws 1232, 1233.

[7] As pointed out in Montana Auto. *Ass'n v. Greeley* (1981), 193 Mont. 378, 399, 632 P.2d 300, 311, if the invalid part of a statute is severable from the rest, the portion which is constitutional may stand while the part which is unconstitutional is stricken and rejected. That case further emphasized that a statute is not totally destroyed because of an improper provision, unless such provision is necessary to the integrity of the statute, or was an inducement to its enactment. When an unconstitutional portion of the act is eliminated, if the remainder is complete in itself and capable of being executed in accordance with apparent legislative intent, it must be sustained. *Montana Auto. Ass'n*, 632 P.2d at 311.

[8] We here conclude that the unconstitutional portion of Section 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, nor was it an inducement to its enactment. We further conclude that the remainder of the statute is capable of being executed in accordance with the legislative intent. As

a result of our holding of unconstitutionality, we have eliminated that portion of the statute which allowed an allocation of negligence to nonparties, and in particular to nonparties who had been released from liability by the claimant, nonparties who were immune from liability to the claimant, and any other nonparties who have a defense against the claimants.

Therefore, in accord with our holding, the lined through portion of Section 27-1-703(4), MCA (1987), as illustrated below is hereby excised from the statute as unconstitutional:

27-1-703. Multiple defendants -- determination of liability. ...

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, [and] third-party defendants~~, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant.~~ The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

ISSUE III: Counselor's standard of care.

Did the District Court err in allowing the jury to allocate a percentage of negligence to Edna Goodwin when evidence was not introduced as to the standard of care for a professional counselor?

[9] The issue presented is whether the jury was properly instructed as to the remaining defendants' burden in establishing the negligence of a professional counselor. The jury was allowed to apportion negligence to Goodwin based on an ordinary standard of care instruction. Plaintiffs contend that the District Court should have instructed the jury on the standard of care for a professional counselor. The District Court determined that no standard of care had been established by expert testimony for a professional counselor. This Court has not previously ruled on whether the standard of care for a mental health counselor must be established by expert testimony or whether the jury is able to determine this on their own. We address this issue for the benefit of the parties in the event it remains an issue on retrial. It is the rule in Montana that expert testimony is required as to the standard of care, and as to the professional's violation of that standard of care, before a trier of fact may find such professional negligent. In *Carlson v. Morton* (1987), 229 Mont. 234, 239, 745 P.2d 1133, 1136, the Court stated that expert testimony identifying the doctor's care as negligent or the doctor's own testimony clearly establishing his own conduct as negligent was necessary. This has been applied as well to dentists and orthodontists in *Llera v. Wisner* (1976), 171 Mont. 254, 262, 557 P.2d 805, 810; to manufacturers and distributors of pharmaceuticals in *Hill v. Squibb & Sons* (1979), 181 Mont. 199, 207, 592 P.2d 1383, 1388; and to abstractors of title in *Doble v. Lincoln County Title Co.* (1985), 215 Mont. 1, 5, 692 P.2d 1267, 1270. Most recently, the Court has required expert testimony to establish the standard of care for a veterinarian in *Zimmerman v. Robertson* (1993), 259 Mont. 105, 108, 854 P.2d 338, 340.

The rationale for requiring expert testimony to establish a standard of care for professionals acting in their professional capacity is that such professionals are required to possess a minimum standard of special knowledge and ability, and as a result juries which are composed of laypersons are normally incompetent to pass judgment on such questions without the assistance of expert testimony. *Carlson*, 745 P.2d at 1137. Professors Prosser and Keeton suggest that although most of the decided cases have dealt with medical doctors,

> the same is undoubtedly true of dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades.

Zimmerman, 854 P.2d at 339, citing Prosser & Keeton on The Law of Torts, Section 32 (5th ed. 1984). Montana's prior decisions on this issue are in accordance with the general rule as summarized by Prosser and Keeton.

We hold that expert testimony was required to establish the standard of care for Ms. Goodwin as a professional counselor before the jury could allocate a percentage of negligence to her.

Section 27-1-703(4), MCA, mandated that the trier of fact consider the negligence and apportion the same to persons such as counselor Goodwin who have been released from liability. As a result, the District Court was faced with the difficult decision and concluded that in order to comply with the statute, it was necessary to instruct the jury to use the ordinary standard of care to apportion negligence to counselor Goodwin. This was necessary because neither party had established a standard of care for a professional counselor and the question arose at the time of settling jury instructions, which was after the conclusion of the submission of evidence. While the District Court had limited choice, we conclude that it was reversible error to apply the ordinary negligence standard to counselor Goodwin.

[10] We hold that the District Court erred in permitting Goodwin's name to be listed on the special verdict form when the standard of care for a professional counselor had not been established by evidence, and there were no specific jury instructions as to the professional standard requirement.

ISSUE IV: Admission of evidence.

Did the District Court err in admitting evidence concerning R.M.'s biological parents?

At the beginning of the trial, plaintiffs submitted a Motion in Limine to exclude all of defendants' highly prejudicial evidence concerning R.M.'s natural parents. Although plaintiffs themselves introduced evidence that R.M.'s natural parents both had low I.Q.s, and had used alcohol and kept her in a neglectful environment during the first few months of her life, they contend on appeal there was no evidence submitted which demonstrated that R.M.'s parents' genetics or actions caused any mental or physical defects to R.M. As a result, plaintiffs contend the District Court committed reversible error in allowing the Department to introduce certain evidence and to argue and comment on such evidence during its closing argument.

At the beginning of the trial, the Department argued that it could establish a causal connection between the natural parents and R.M.'s mental impairment. Premised upon the establishment of a causal connection, the District Court allowed the defendants to introduce evidence about the natural parents. Plaintiffs argue that the connection between the natural parents and R.M.'s mental impairment was never made, that the court erred in failing to admonish the jury and again erred in allowing closing arguments on the evidence. They contend this was plain error under Montana law and should have been excluded as more prejudicial than probative. They claim that without any connection to R.M.'s present condition, the evidence concerning her natural parents was inherently prejudicial and is reversible error. As explained below, we agree with plaintiffs that this was reversible error.

Defendants' closing argument included the following statements:

> Now, we know from the evidence that there are some hereditary influences at work with [R.M.]. There were drug and alcohol problems in the past there. She was a victim of early abuse and neglect. And I'm really sorry she went through that, but that's nothing that any of us can do anything about except to help her try to get over it in the future.
>
> We know that her parents had problems emotionally and socially, and we've got evidence that those kind of things have a long, lasting effect.

The Department contends the evidence was properly admitted for three reasons: (1) plaintiffs opened the door by asking their own experts whether genetic factors contributed to R.M.'s functional deficits; (2) defendants properly inquired about R.M.'s parents to impeach the plaintiffs' experts and since the evidence was not complete, defendants had to cross-examine the experts in this area because the experts based their opinions on incomplete information; and (3) the evidence about R.M.'s parents was relevant to R.M.'s damages because her impairments were caused by a variety of factors, including genetic factors, according to a witness for the Department, and plaintiffs' own experts testified that factors other than the brain injury contributed to her current problems. They claim this last statement that plaintiffs' own experts testified that factors other than the brain injury contributed to her current problems provided the medical link required by *Kimes v. Herrin* (1985), 217 Mont. 330, 705 P.2d 108.

In *Kimes*, the court allowed testimony regarding family fighting and drinking by the appellant's father in an action where damages were at issue and the reasons for the appellant's symptoms were critical to the issue of damages. The appellant was a two-year-old at the time of her injuries from an automobile accident. Several years later she exhibited symptoms including listlessness, drowsiness and staring. At trial, the respondent introduced testimony about family fighting and her father's drinking to show that these symptoms were caused by the appellant's environment and not the collision.

We stated that the evidence about her family environment was relevant under Rule 401, M.R.Evid., because it had a tendency to make the alleged cause of the symptoms more or less probable than it would

be without the testimony and, thus, must be weighed to determine whether it should be excluded under Rule 403, M.R.Evid. *Kimes*, 705 P.2d at 110. Rule 403, M.R.Evid., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

The decision whether or not to exclude such evidence will not be reversed by this Court unless the district court has abused its discretion. *Kimes*, 705 P.2d at 110. We stated:

> We hold that the District Court abused its discretion in allowing this testimony. The District Court demonstrated some concern over the admissibility of the questioned testimony and allowed the testimony because the respondent assured the District Court that home environment would be medically linked to the appellant's symptoms. We note that both parties' expert witnesses indicated that poor home environment may cause symptoms such as were exhibited by appellant. However, no evidence at trial established a medical connection between poor home environment and the appellant's symptoms.

Kimes, 705 P.2d at 110.

[11] In this case, the Department never made the causal connection. The Department is correct in stating plaintiffs did ask their expert some questions relating to R.M.'s biological parents. Although testimony was elicited from several witnesses regarding R.M.'s biological parents, none of the evidence links her impairment to the natural parents. After a careful review of the record, we conclude that the testimony provided by the medical experts failed to establish a medical link between the actions of R.M.'s biological parents and any condition which R.M. had prior to the beatings by Dennis Kuipers. On the basis of our holding in *Kimes*, we conclude that the similar sort of evidence introduced here and commented upon in defendants' closing argument was more prejudicial to R.M. than probative. We further conclude, as in *Kimes*, that although the medical experts of both parties indicated that genetic factors and other information about the biological parents could contribute to R.M.'s present condition, no evidence was presented to make the causal connection more probable than not in this case.

We hold the District Court abused its discretion in admitting evidence concerning R.M.'s biological parents and in allowing the Department to comment on such evidence during its closing argument.

ISSUE V: Jury Instructions.

Did the District Court err in instructing the jury?

Plaintiffs contend that the District Court made several errors involving jury instructions which constitute reversible error. We will consider the same to the extent needed by the parties on retrial. As stated in *Story v. City of Bozeman* (1993), 259 Mont. 207, 222, 856 P.2d 202, 211:

> When examining whether certain jury instructions were properly given or refused, we must consider the jury instructions in their entirety and in connection with other instructions given and the evidence introduced at trial.

[12] There is no reversible error in the giving or refusing of certain instructions if the jury instructions, viewed in their entirety, state the correct law applicable to the case. *Walden v. State* (1991), 250 Mont. 132, 137, 818 P.2d 1190, 1193. Bearing these principles in mind, we address the contentions of the plaintiffs concerning the District Court's treatment of jury instructions in this case.

a. *Did the District court err in instructing the jury on the Department of Family Services' duty to report child abuse to the County Attorney?*

The District Court refused to give a jury instruction offered by the plaintiffs on the Department's statutory duty to report child abuse cases to the County Attorney. This is a matter of interpreting Section 41-3-201, MCA, which provides in pertinent part:

> (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected, they shall report the matter promptly to the department of family services or its local affiliate, which then shall notify the county attorney of the county where the child resides.
>
> (2) Professionals and officials required to report are:
>
> ...
>
> (g) a peace officer or other law enforcement official; ...

In *Demaree v. Safeway Stores, Inc.* (1973) 162 Mont. 47, 54, 508 P.2d 570, 575, the Court said that a jury instruction which assumes as fact a matter legitimately in controversy, as shown by the evidence, is erroneous. The fact issue here, according to the Department, was whether "reasonable cause" to suspect abuse or neglect applied to both the law enforcement officers *and* the Department. We conclude that it applied only to the police officers.

The Department did not notify the County Attorney of the report it received from the Bozeman Police

Department concerning the Rax incident. We conclude that the plain language of this statute required the Department to report the Rax incident to the Gallatin County Attorney. This was not done.

Plaintiffs' proposed Instruction No. 30 relating to the Department's duty to report abuse was as follows:

> When the Department of Family Services receives a report of child abuse, it is required to report the incident to the County Attorney where the child resides.

The District Court refused to give this instruction and the plaintiffs claim this affected the percentage of negligence attributed to the Department and is reversible error. The Department contends that the instruction was properly refused as it did not apply to the evidence in this case because police had no reasonable cause to suspect abuse at the Rax restaurant. This does not agree with the record.

The record indicates police believed there was reasonable cause to suspect abuse, but determined there was no probable cause to arrest Dennis Kuipers. The officer who observed the child also testified that she was new on the job and could not readily identify certain signs which she later learned should have alerted her that the child had been abused at the Rax restaurant, and that she likely had probable cause then to arrest Dennis Kuipers. Nonetheless, that is irrelevant here because the case *was* reported to the Department and the statute quoted above requires the Department subsequently to report it to the County Attorney.

[13] The "reasonable cause" reference in Section 41-3-201, MCA, applies to the police having reasonable cause to suspect abuse or neglect. As we have stated, it does not apply to the Department. The statute requires the Department, upon receiving such a report, to notify the County Attorney of the county where the child resides. Plaintiffs' proposed Instruction No. 30 was a correct statement of the law and was improperly refused.

One of the theories of plaintiffs' case was that the County Attorney was deprived of the opportunity to protect R.M. because of the Department's failure to comply with the statute. The District Court's failure to instruct the jury on the duty of the Department to notify the County Attorney prevented plaintiffs from arguing this theory of the case and could have affected the percentage of negligence attributed to the Department by the jury. In accord with the principles stated above from *Story* and *Walden*, refusal of plaintiffs' proposed instruction failed to state the correct law of the case.

We hold the District Court erred in refusing to give the plaintiffs' offered jury instruction relating to the Department's statutory duty to report the Rax incident to the Gallatin County Attorney's office.

b. *Did the District Court err in instructing the jury on discounting economic damages?*

Plaintiffs presented testimony by an expert in economics who estimated future economic damages at $1,400,000 and testified about the present value of that amount. Plaintiffs' expert prepared his evaluation by using projected future medical costs based upon figures given to him by the Missoula Community Hospital head injury clinic. The economist then testified in detail about his method in reducing the damages to present value. Plaintiffs contend that the instruction given by the court allowed R.M.'s damages to be reduced twice -- first by the expert's testimony and then by the jury.

Plaintiffs contend that although the District Court instructed the jury on the proper law, there was no information given to the jury from which they could base their own calculations to reduce to present value any amount they arrived at as an appropriate award if different from the amount asked for by the plaintiffs. Plaintiffs' estimate of future damages through the economist was a much larger figure than the amount allowed by the jury. Plaintiffs contend that it is not known how the jury could have reduced the award because no instruction was given in that regard. They contend there should have been another instruction telling the jury how to calculate present value if they did not accept the expert's measure of damages. The Department counters that the law of Montana allows the jury to disregard the experts entirely in determining the level of damages.

[14] Although the plaintiffs' estimate of $1,400,000 in future medical expenses alone was uncontested and the plaintiffs asked for much more in damages, it is within the province of the jury to reject entirely the amount of damages estimated by experts. Plaintiffs argue that "we must assume that the jury followed the law in this case and again discounted the damage figures given to the jury by Plaintiff's expert." Although the amount of damages is solely within the province of the jury, the jury is not given carte blanche in that regard and there must be some substantial evidence to support the jury verdict. *Tappan v. Higgins* (1989), 240 Mont. 158, 160, 783 P.2d 396, 397. The District Court correctly instructed the jury that it was not bound by the testimony of the experts. We conclude there is no basis to assume that the damage figures provided by plaintiffs' expert were discounted twice -- once by the expert and again by the jury.

Instruction No. 35, offered by defendants and objected to by the plaintiffs, provided as follows:

> You must adjust future economic losses to their present cash value.
>
> Present cash value is a sum of money which, together with what that money may reasonably be expected to earn in the future, when invested at a reasonable rate of return, will produce the dollar equivalent of such future damages.
>
> In arriving at present cash value you may also consider the effect that inflation and increases in wages will have on offsetting the amounts that money will earn.

This instruction was taken from MPI 25.91; however, the pattern instruction was not given in its entirety. The following was omitted:

> The only amounts to be adjusted to present cash value are future earnings and future medical costs. The discount principles stated in this instruction do not apply to any other damages.

The Comment to this instruction states that an instruction on present value "should not be given unless there is sufficient foundation in the testimony to allow the jury to make the adjustment." MPI 25.91 Damages - Present Value.

If the instructions in their entirety correctly state the law, there is no reversible error. We conclude, however, that Instruction No. 35 as given by the District Court omitted a very necessary portion regarding which amounts are to be discounted to present value and thus did not correctly state the law.

[15] We hold that the District Court erred in instructing the jury by Instruction No. 35 and failing to include the provision that the only amounts to be so adjusted to present cash value are "future earnings and future medical costs."

For assistance at retrial, we emphasize that neither party made reference to Section 25-9-402, MCA, which provides:

> **25-9-402. Findings by trier of fact -- civil actions.** In any action for personal injury, property damage, or wrongful death where liability is found after trial and in which $100,000 or more in future damages is awarded to the claimant, the trier of fact shall make a separate finding as to the amount of any future damages so awarded *and state whether the amount of future damages has been reduced to present value.* (Emphasis supplied.)

[16] While the special verdict form used in this case provided for findings on future damages, there was no separate statement by the jury as to whether the amount of future damages had been reduced to present value as required by statute. Upon retrial, this statute should also be followed.

ISSUE VI: Governmental Immunity.

Is the Department immune from tort liability for its failure to protect R.M.?

In its Cross-Appeal, the Department argues that it is immune from tort liability for two reasons. First, it contends that the acts of approval for adoption, foster placement and investigation of the child abuse report were quasi-judicial functions in which the Department was acting in a quasi-judicial capacity and, therefore, the District Court should have dismissed the tort claim against it because the Department was acting in a discretionary capacity concerning the placement of R.M. in the Kuipers' home. Second, it argues that it is immune from tort liability based on the language of Section 41-3-203, MCA, which grants immunity to persons investigating or reporting incidents of child abuse or neglect under Sections 41-3-201 or 41-3-202, MCA.

This Court has addressed and clarified the concept of quasi-judicial immunity in several cases. In *Koppen v. Board of Medical Examiners* (1988), 233 Mont. 214, 219, 759 P.2d 173, 176, we stated that the Board of Medical Examiners was a quasi-judicial body because of the nature of its vested discretion to determine whether or not to adjudicate an alleged violation by a licensee. However, the Board of Medical Examiners was subject to the notice and hearing requirements of the Montana Administrative Procedure Act (MAPA), Section 2-4-101, MCA, et seq., and its decisions were subject to judicial review -- key aspects of our ruling that the Board of Medical Examiners was a quasi-judicial body and absolutely immune in the exercise of that determination. *Koppen*, 759 P.2d at 176.

In so holding, we cited *Butz v. Economou* (1978), 438 U.S. 478, 513-14, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895, 920:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.

The *Butz* court characterized quasi-judicial immunity as a logical descendant of prosecutorial immunity. The significance of that analogy is that immunity in both circumstances is based on the *nature of the functions* carried out by agencies or officials. *Butz*, 438 U.S. at 511-16, 98 S.Ct. at 2913-15, 57 L.Ed.2d at 919-22.

Thus, unlike the Board of Medical Examiners in *Koppen*, in *State Bd. of Dentistry v. Kandarian* (1991), 248 Mont. 444, 813 P.2d 409, the Board of Dentistry was proceeding against a nonlicensee under Section 37-4-328(3), MCA, which did not require an administrative hearing before the Board of Dentistry under MAPA. The Board was acting in its capacity as an executive agency seeking an injunction in the district court, thereby putting itself in the role of litigant or advocate, not adjudicator. *Kandarian*, 813 P.2d at 412. The Board of Dentistry argued for immunity similar to prosecutorial immunity. We emphasized that there were procedural safeguards inherent in the prosecutorial system which acted as a check on the prosecutor's independence and which were not present in that case. *Kandarian*, 813 P.2d at 412.

In *Koppen*, 759 P.2d at 176, the Court summarized *Butz* and two Montana opinions, *Ronek v. Gallatin County* (1987), 227 Mont. 514, 740 P.2d 1115, *cert. denied*, 485 U.S. 962, 108 S.Ct. 1226, 99 L.Ed.2d 426, and *State ex rel. Dept. of Justice v. District Court* (1977), 172 Mont. 88, 560 P.2d 1328, as follows:

> [They] stand for the proposition that entities called upon to function judicially should be immunized in order to facilitate the proper execution of their duties. However, the basis for these decisions ... is the common law.

[17] Thus, our decisions governing tort liability of governmental agencies provide that a governmental entity may be immune from tort liability if it committed a tort while performing a quasi-judicial function even when the governmental unit is not characterized as a quasi-judicial entity.

[18] We addressed this issue at some length in *State ex rel. Workers' Compensation Division v. District Court* (hereinafter *Great Western Sugar*) (1990), 246 Mont. 225, 805 P.2d 1272. We said that the core determination for immunity to apply to the function of the agency there was that it be quasi-judicial rather than administrative or ministerial, noting that our prior decisions had clouded the distinction. Section 2-15-102(9), MCA, of MAPA defines "quasi-judicial function" as:

> "Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies... .

In *Great Western Sugar*, 805 P.2d at 1277, we further clarified this as follows:

> ... Here, the statutory scheme mandates that the Division at least review a self-insurer's financial condition. Admittedly the statutes and administrative rules grant the Division discretion in renewing GW's application as a plan No. 1 self-insurer. However, in this case the Division never exercised this discretion to determine GW's eligibility to self-insure its risk under plan no. 1. Rather, there was an admitted complete failure by the Division to undertake any of the review necessary to made such a determination. *Thus, the negligence occurred at a stage where the Division's function was entirely ministerial:* (Emphasis supplied.)
>
> "Official action, the result of performing a certain specific duty arising from designated facts, is a ministerial act... . Another way of expressing the same thought is that a duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.... And that a necessity may exist for the ascertainment, from personal knowledge or from information derived from other sources, of those facts or conditions, upon the existence or fulfillment of which, the performance of the act becomes a clear and specific duty, *does not operate to convert the act into one judicial in its nature.*" (Emphasis is original.)
>
> The discretion afforded by the statutes and rules in this case was never exercised, rather, the Division breached its underlying duty, mandated by the statutory scheme for plan no. 1 insurance, to investigate GW's eligibility to self-insure. Such act was purely ministerial ... and cannot be a basis for invoking quasi-judicial immunity:
>
> "Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.... ." (Citations omitted.)

We then noted that our analysis was limited to common-law quasi-judicial immunity, but that the "exercise of judgment and discretion" required by Section 2-15-102(9), MCA, of MAPA to invoke immunity was analogous to the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680(a), under which the FTCA does not waive immunity for claims based on negligence of governmental employees exercising or performing discretionary functions of a federal agency, regardless of whether the discretion is abused. *Great Western Sugar*, 805 P.2d at 1277-78.

In *Berkovitz v. United States* (1988), 486 U.S. 531, 536, 108 S.Ct. 1958-59, 100 L.Ed.2d 531, 540-41, the United States Supreme Court said immune acts must involve "permissible exercise of policy discretion":

> [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Both in *Great Western Sugar* and as recognized by the District Court in this case, there was a failure of the agency to follow procedures that would enable the agency to make a decision:

> The duties imposed by the statutory scheme on the Division's employee were purely investigative, ministerial and administrative. Because the Division failed to perform its duty to review or examine GW's application as prescribed by statute, and because simply performing this duty does not involve the use of quasi-judicial discretion, the Division is not protected by quasi-judicial immunity at this stage. The Division has simply not functioned as such under these facts.

[19] *Great Western Sugar*, 805 P.2d at 1278. The Department is required by statute to license and train foster care providers and to investigate adoptive homes. *See* Section 41-3-1103(b) and (d), MCA; Section 41-3-1142, MCA; and Section 41-3-202(1) and (2), MCA. We conclude the Department, at all times leading up to the tort sued upon in this case, was acting ministerially.

The conclusion we reach in classifying the Department's actions is significant only if quasi-judicial immunity can only attach to a *quasi-judicial body* which is carrying out the function. *Great Western Sugar*, 805 P.2d at 1276, which controls here, provides in pertinent part:

> We conclude that immunity does not attach because the Division is not expressly designated a quasi-judicial board, *see* Section 2-15-124, MCA, *see* generally Title 2, Chapter 15, MCA, nor was it performing a quasi-judicial function as will be discussed below.... .

The Department in this case was not a statutorily-designated quasi-judicial board. *Great Western Sugar*, 805 P.2d at 1277-78, provides that immunity is not confined to entities which are statutorily-designated as quasi-judicial boards. *Gerber v. Commissioner of Ins.* (1990), 242 Mont. 369, 371-72, 786 P.2d 1199, 1200-01, provides further clarification that quasi-judicial immunity may apply beyond the context of a quasi-judicial board as the Insurance Commissioner is not designated accordingly, yet the Insurance Commissioner may be afforded quasi-judicial immunity for quasi-judicial functions. For example, in *Gerber*, the Insurance Commissioner's method of conducting an investigation was protected by quasi-judicial immunity because the applicable statutes expressly designated investigations as discretionary acts. *Gerber*, 786 P.2d at 1200-01. *See also Trout v. Bennett* (1992), 252 Mont. 416, 427, 830 P.2d 81, 88.

[20] We agree with the Department that immunity may apply to the exercise of a quasi-judicial function where there is no statutorily-designated quasi-judicial board involved in the action. However, like the Workers' Compensation Division in *Great Western Sugar*, the Department here was not carrying on an investigation of the sort which is granted immunity such as one that is a part of a contested case hearing; it is not entitled to immunity when it is not a quasi-judicial body carrying out a quasi-judicial function.

[21] We conclude the Department was not acting in a quasi-judicial role in its actions in this case. There was no contested case hearing involved, nor was there any other adversarial type of proceeding. In addition, the Department's actions were not discretionary, but were mandated by statute and were ministerial and administrative in nature.

[22] The Department's second argument relating to immunity is that it is granted statutory immunity by Section 41-3-203, MCA, which provides immunity for persons required to report and investigate child abuse under the provisions of Sections 41-3-201 and 41-3-202, MCA. This immunity is not intended for the Department; rather, it is intended to protect individuals such as teachers, doctors, and psychologists who are required to report suspected abuse. The stated public policy of Montana is to "provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection." Section 41-3-101(2), MCA. We conclude that Section 41-3-203, MCA, also does not immunize the Department from tort liability.

We hold the Department is not immune from tort liability for its failure to protect R.M. in this case.

ISSUE VII: Who is to be included on the special verdict form in a subsequent trial?

On retrial, under our holding on Issue II, the trier of fact can consider the negligence of the following parties to the action: claimant, injured person, defen-

EXHIBIT 9 774
DATE 2-14-95
SB 212

dant and third party defendants. In the absence of a record and briefing comprehensively addressing it, we conclude it is not appropriate to further address this issue.

Affirmed in part, reversed in part and remanded.

CHIEF JUSTICE TURNAGE, JUSTICES HARRISON, GRAY, TRIEWEILER, NELSON and HUNT concur.

APPENDIX

Section 27-1-703, MCA (1987), provides as follows:

27-1-703. Multiple defendants -- determination of liability. (1) Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) Any party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him.

Section 27-1-703, MCA (1985), provided:

27-1-703. Multiple defendants jointly and severally liable -- right of contribution. (1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.

(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in

a pending or subsequent action for contribution from the noncontributing party.

Washington state's similar statute reads as follows:

Section 4.22.070. Percentage of fault -- Determination -- Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contributions against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Wash. Rev. Code Ann. Section 4.22.070 (1988).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 2/14/95
BILL NO. SB 212

PLAINTIFF'S EXHIBIT 58

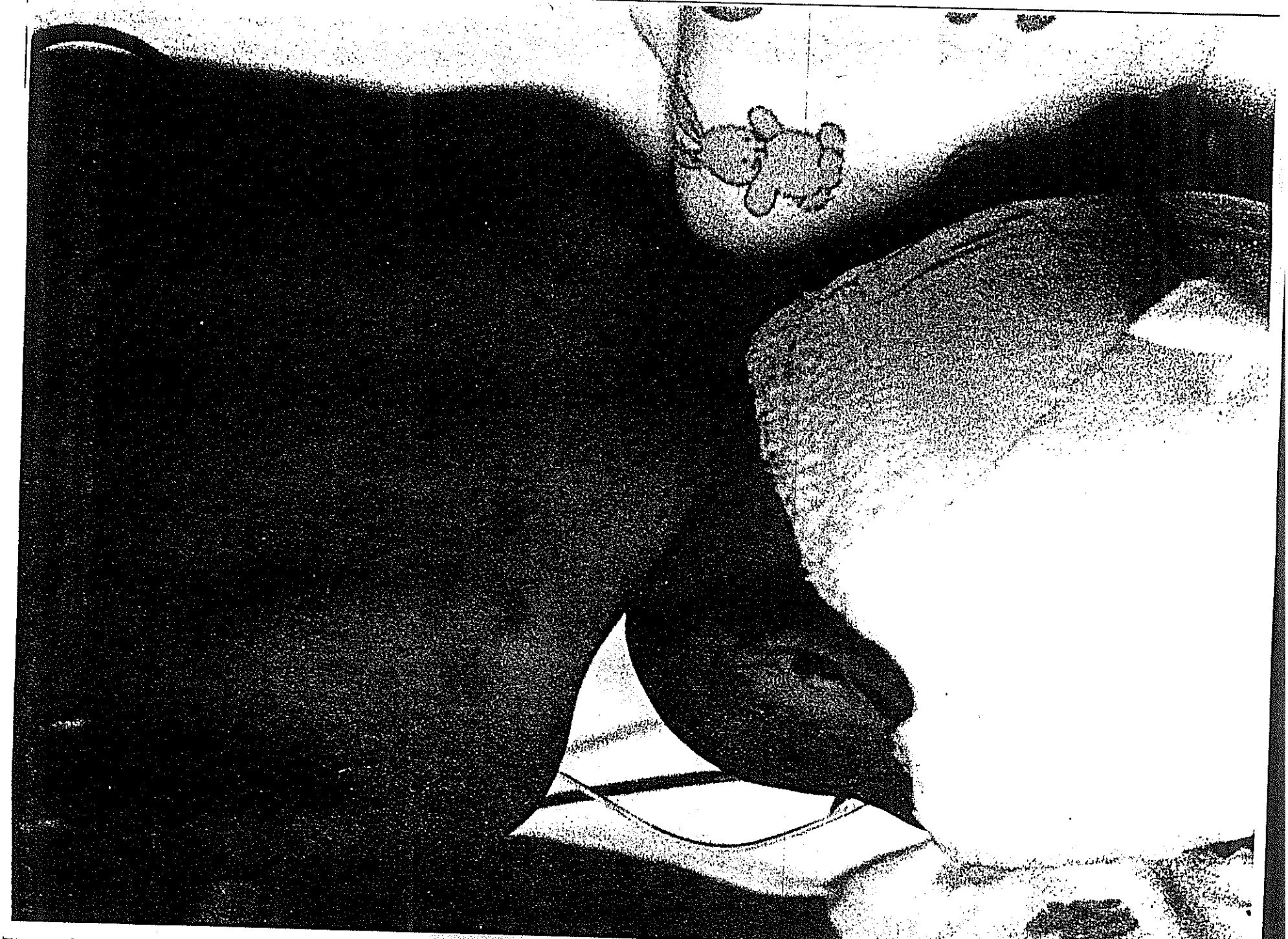


EXHIBIT 10
DATE 2-14-95
SB 212

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

EXHIBIT NO. 11
DATE 2/14/95
BILL NO. SB 212

February 14, 1995

Senator Bruce Crippen, Chair
Members of the Senate Judiciary Committee
State Capitol
Helena, Montana 59620

RE: Senate Bill 212

Dear Senator Crippen and Members of Senate Judiciary Committee:

The Doctors' Company insures approximately 675 of Montana's 1450 physicians for medical malpractice. I am writing to express our support for SB 212, which addressed procedural safeguards in Montana's joint and several liability statute identified last year by the Montana Supreme Court in Newville v. Dept. of Family Services.

Medical liability cases frequently involve multiple defendants. For example, a birth may involve at least three doctors (obstetrician, neonatologist, and anesthesiologist), several nurses, and the hospital. Often one or more of the named defendants may settle with plaintiff prior to trial. In other instances, that individual or entity may not be named by plaintiff as a defendant at all, particularly where insurance coverage is lacking.

The Newville case holding prohibits use of the "empty chair" defense at trial, regardless of actual liability. Therefore, a doctor whose liability exposure is minimal may be held financially accountable for the total amount of damages.

We believe that this result is patently unfair. We urge your support for SB 212, which will restore the use of the balanced approach to liability intended by Section 27-1-703 of the MCA.

Thank you.

Sincerely,

Mona Jamison

Mona Jamison
Lobbyist for the Doctors' Company

DATE 2/14/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 212
SJR 7

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Opp
Allen Lanning		SB 212	X	
Charles R. Brooks	Bigs Chamber	SB 212	X	
Randy Bishop	MTLA	212		X
David Owen	MT Chamber	212	✓	
John Sullivan	MDTL	212	✓	
Jim Tutwiler	MT Utility Coal	212	✓	
Bill Fitzsimmons	RMITD - Dept of Admin	212	–	
Bill LEARY	MT. Bankers Assn	212	✓	
Jerome Loendorf	mt. Med Assn	212	✓	
Mike Schweitzer	Billings Anesthesiology	212	–	
Greg Jackson	MUCOWA	212	✓	
John Richardson	MTLA	212		✓
Jacqueline Lenmark	Am. Ins. Ass'n	212	✓	
Bob Ashbrane	State Farm Ins	212	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETAR

REGISTER.F10

DATE 2/14/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 212

SJR 7

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Oppo
Richard Miller	State Library	HB 83		✓
Roger McGlenn	Independent Ins. Agents Assoc. of MT	SB 212	✓	
Marie E. Darkee	MT Tavern Assn	SB 212	✓	
Michael A. Keedy	MSBA	SB 212	X	
Mona Jamison	Doctors' Co.	SB 212	✓	
DAN WALKER	MT LIAB COALITION	SB 212	✓	
STAN KALECZYC	MT MUNICIPAL INSURANCE AUTHORITY	SB 212	✓	
Riley Johnson	NFIB	SB 212	✓	
Ben Havdahl	MT Motor Carriers Assn	SB 212	✓	
Steve Turkiewicz	Mt. Auto Dealers Assn	SB 212	✓	
Bob Worthington	MMIA	SB 212	✓	
Steve Browning	MHA	SB 212	✓	
Tom Hopgood	Mt. Ind. Bankers Assc	SB 212	✓	
Don Allen	MT. Wood Products Assn	SB 212	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETAI

REGISTER.F10

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Debbie Berney	PIA - Prof. Ins. Agts	212	✓	
Gail Abercrombie	MT Petroleum Assn	212	✓	
Brad Griffin	MT Retail Assoc.	212	✓	
Carl Schweitzer	MT Cont Assn	212	✓	
Russell B Hill	MTZA	SB 212		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.FIO

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **BRUCE D. CRIPPEN CHAIRMAN**, on February 15, 1995, at 8:00 A.M.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	SB 237, SB 316, SB 333, SB 350
Executive Action:	SB 350, SB 237, SB 316, SB 333, SJR 7, SB 206

HEARING ON SB 350

Opening Statement by Sponsor:

SENATOR FRED VAN VALKENBURG, Senate District 32, Missoula, sponsored SB 350. He said the bill would allow the Department of Corrections to tell a new employer that a person (who is on parole) has a history of stealing from employers. He said it was a logical idea that employers should know about the prior thefts, but the Department of Corrections and Human Services parole staff is prohibited from providing that information to employers because it would violate the privacy of the probationer or

they would have to pay the piper on a second offense.

CHAIRMAN CRIPPEN asked if **SENATOR HOLDEN** meant that those who can afford it will suffer the consequences of their actions, but those who cannot afford it ought not to be able to suffer the consequences of their actions?

SENATOR HOLDEN said it would enter in, certainly.

CHAIRMAN CRIPPEN raised the question if a low income person should be given another chance to hit somebody on the highway.

SENATOR HOLDEN said they intended to take a lethal weapon away from a drunk driver. But if they confiscated cars from median-income people, would they in some way be increasing welfare rolls by rendering people unable to work? Would they lose their jobs?

SENATOR JABS said there were car pools, friends, neighbors and horses.

SENATOR BAER said that after the first couple of offenders are punished and into the newspapers, this could be one of the most powerful deterrents for second offenders.

SENATOR HALLIGAN said the forfeiture of the car would apply only to second offense of driving while suspended, not merely second offense DUI.

CHAIRMAN CRIPPEN said by then their insurance probably had been lost as well. He said it was poor public policy to have those people driving anyway.

Vote: The **MOTION THAT SB 316 DO PASS CARRIED UNANIMOUSLY** on an oral vote.

EXECUTIVE ACTION ON SB 333

Motion/Vote: **SENATOR BISHOP MOVED THAT SB 333 DO PASS.** The **MOTION CARRIED UNANIMOUSLY** on an oral vote.

EXECUTIVE ACTION ON SB 212

Discussion: **SENATOR HALLIGAN** asked how the committee felt about an amendment to provide a notice to the non-party by regular mail when the answer is filed that they had been mentioned in a lawsuit. He thought the people would like to know, even though they cannot intervene; and they could contact the plaintiff to defend themselves. He said **Mr. Alke** had no objections.

EXECUTIVE ACTION ON SB 206

1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 2-15-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE CRIPPEN**, on February 16, 1995, at 10:00 AM

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	SB 308, SB 340, SJR 16, SB 402
Executive Action:	SJR 16, SB 340, SB 402, SB 206, SB 212, SB 314, SB 308

HEARING ON SB 308

Opening Statement by Sponsor:

SENATOR SHARON ESTRADA, Senate District 7, Billings, presented SB 308. In a civil action, reasonable attorney fees as determined by the court will be awarded to the prevailing party. The intent of this bill is to unclog the court system, put a stop to frivolous lawsuits and eventually bring down insurance rates. SB 308 is a form of tort reform.

CHAIRMAN CRIPPEN stated the committee tabled the bill. In subsequent discussions he had with **SENATOR BURNETT**, they discussed another bill which addressed some of his concerns as well as getting something out of his bill in terms of videotaping. He indicated to **CHAIRMAN CRIPPEN** that he would be satisfied with that situation.

Vote: The motion **CARRIED UNANIMOUSLY** on oral vote.

Motion: **SENATOR HALLIGAN MOVED SB 206 DO PASS AS AMENDED.** The motion **CARRIED** on oral vote with **SENATORS BARTLETT, ESTRADA** and **NELSON** voting **"NO".**

{Tape: 3; Side: A}

EXECUTIVE ACTION ON SB 212

Discussion: **SENATOR BISHOP** commented that the amendment would notify the parties named in the nonparty defense contained in the answer. They would be notified by certified mail.

SENATOR HALLIGAN commented the amendment does not use the right language. The handwritten amendment, **EXHIBIT 6,** uses the language of the bill.

Motion: **SENATOR BISHOP MOVED TO AMEND SB 212.**

Discussion: **SENATOR HALLIGAN** explained that the intent of the amendment is to clarify that a person named in an answer to a lawsuit, if alleged in whole or in part to have caused any of the claimant's injuries, the person will be notified by certified mail that they have been named.

SENATOR BISHOP commented that it is only fair to those parties to have a notice.

Vote: The motion **CARRIED UNANIMOUSLY** on oral vote.

Motion: **SENATOR BISHOP MOVED SB 212 DO PASS AS AMENDED.**

Discussion: **SENATOR BISHOP** disagreed with one of the biggest contentions made by the opponents in that people would be brought into the nonparty defense frivolously.

SENATOR DOHERTY commented that the testimony the committee heard in regard to the verdict form proposed by defense counsel is an example of why the empty chair defense is a question of fairness. He believes that the defense, if they believe someone is involved in an action and may bear some responsibility, has an obligation not only to notify them but should also bring them into the lawsuit as third-party defendants. If they truly believe that the person has some degree of culpability for whatever has happened, they ought to do that. Simply notifying someone so

that at a later date you can argue in front of the jury that there was someone else who may be responsible but unfortunately are not present, begs the question. The reason they are not present is because (1) the plaintiffs don't believe that they ought to be there and (2) the defense counsel in a strategic move is using the law to benefit their client. In the Newville case, he would have done the same thing. Setting up the rules which would allow defense counsel to do that, creates an unfair advantage for them. They can bring in people as party defendants. If they believe they are involved and want to argue that to the jury, they ought to bring them into the lawsuit. What is lost in the question of deep pockets is the innocent party. The person who was injured. In the case of two defendants, one of whom may have been terribly wrong and another who had some contribution to the injuries, it is unfair to shift the burden to the injured person or corporation.

SENATOR BISHOP stated that if a prospective defendant has settled with the plaintiff, under the Deer opinion, that person cannot be brought into the lawsuit. If two people were responsible for the accident and the one who was most responsible had settled out, they cannot be brought into the lawsuit. The person minimally responsible could bear the burden of the entire lawsuit.

SENATOR DOHERTY stated that would not be correct under comparative negligence. If they are less than 50% negligent, they are out. You want them to have every incentive to settle the case as quickly as possible. If they know that they could be stuck in that situation, they would be more likely to settle. Early settlement on valid cases helps everyone.

SENATOR BISHOP commented if you require the defendants to bring in other people, they are getting hit twice. They may have already settled. They would have to hire an attorney to defend themselves.

SENATOR HALLIGAN stated they have had special sessions involving tort reform. The proponents had done a superb job in developing the procedural safeguards in the bill. The part of the Newville case which he has a difficult time with is the part which states that they concluded that the allocations of percentages of liability to nonparties violates substantive due process. They have already handled the procedural due process. There is a separate component which is called substantive. How can this be solved? All states accomplish this in different ways. If this bill is passed there is still a problem and it is still unconstitutional. Perhaps the Court will have to decide.

SENATOR BISHOP commented that if nonparties are alleged in the answer, it is up to the defendant who does that to prove the extent of their involvement. The burden does not shift to the plaintiff in that case. Whatever the jury does in that case is not binding on nonparties.

Vote: The motion CARRIED on roll call vote with SENATORS BARTLETT, DOHERTY, and HALLIGAN voting "NO".

EXECUTIVE ACTION ON SB 314

Motion\Vote: SENATOR GROSFIELD MOVED SB 314 BE TAKEN OFF THE TABLE. The motion CARRIED on oral vote.

EXECUTIVE ACTION ON SB 212

Motion: SENATOR BISHOP MOVED TO RECONSIDER THE SB 212 DO PASS AS AMENDED MOTION FOR PURPOSES OF AMENDMENT.

Discussion: SENATOR BISHOP believed the "Wetch" amendment was added to the bill. This amendment apparently did not get into the bill. The Montana Defense Trial Lawyers testified about the Wetch case. In this case, the secretary of an employer fell into a hole by the door which she was accustomed to using. This hole was dug by Unique Concrete Company. She was party to a conversation between the concrete company and the employer regarding the hole. She forgot the hole was there, walked out the door and fell into the hole. The concrete company wanted the door barricaded but the employer said he wanted the door left open for ventilation. An employee cannot sue an employer under a workers' compensation situation, the concrete company could not show that conversation or anything regarding it at trial. The secretary was able to collect from the concrete company. They were very minimally responsible. This amendment would correct that situation.

Vote: The motion CARRIED on oral vote.

Motion/Vote: SENATOR BISHOP MOVED TO FURTHER AMEND SB 212.

Discussion: SENATOR BARTLETT stated the proposed amendment concerned her. It deals with workers' compensation and the exclusive remedy of the employer. She believes that there are some extreme circumstances wherein if an employer knowingly and negligently kept a work place in an unsafe condition, there may be grounds for a suit in addition to the workers' compensation coverage. She suggested the amendment be turned down at this point so that it could be offered on the floor. They would then have an opportunity to examine that dimension of the issue before this is made a part of the bill. That not being the case, perhaps they could have an expert address this issue tomorrow in executive session.

SENATOR BISHOP commented this did not have anything to do with workers' compensation. It was not part of the action at all.

SENATOR DOHERTY, referring to the wording in the amendment "negligence on the part of the claimant's employer or coemployee may be considered and determined as part of a nonparty defense", stated that if that can be considered as a nonparty defense this

may be allowing an opening of the exclusive remedy provision under the Workers' Compensation Act.

John Alke commented that **SENATOR BARTLETT** is right in a sense and wrong in a sense. The Wetch case was a unique case that said you couldn't consider fault of the employer because the statute had two sentences. Page 2 of SB 212, line 4 and 5, says that when you allocate fault, you are allocating fault between persons released from liability by the claimant, persons immune from liability to the claimant. . . The employer is immune because of the exclusivity rule under workers' compensation. In 1987, when this bill was drafted the sentence was added which **SENATOR BISHOP'S** amendment strikes. This sentence states that in attributing negligence among persons, the trier of fact may not consider or determine the negligence on a part of an injured persons employer . . . When that sentence was added they thought they were protecting the exclusivity. The exclusivity exists irrespective of the statute. The Supreme Court in Wetch said they had no choice but to prohibit even the evidence of this conversation because of this nonsensical second sentence. They indicated that the legislature put the second sentence in and until that sentence is removed, this would be the way they would have to rule. It is not intended in any way to affect the worker's right to workers' compensation without any showing of negligence. It is not intended in anyway to affect the exclusivity provision. In a trial against the third party wherein a machine blew up in a workshop, the injured employee would not only receive workers' compensation but would be able to go after the third party who designed the machine. This bill says that when the lawsuit between a manufacturer of the equipment and the plaintiff is considered, if the employer was negligent, that is something they can consider in determining how much fault to give to the manufacturer. It does not touch the benefits program. It does not touch the exclusivity rule.

SENATOR DOHERTY questioned if there is negligence which can be considered on the part of a third party as part of a nonparty defense, is there any validity to the notion that if that negligence is considered you also ought to be able to act on that negligence and thereby open the door that the injured party would be able to go against the employer directly for their negligence.

David Scott, Department of Labor, commented he did not have enough knowledge about the subject to answer the question.

Vote: The motion **CARRIED** on roll call vote with **SENATORS BARTLETT** and **DOHERTY** voting **"NO"**.

Motion\Vote: **SENATOR BISHOP MOVED SB 212 DO PASS AS AMENDED.** The motion **CARRIED** on oral vote with **SENATORS BARTLETT, HALLIGAN** and **DOHERTY** voting **"NO"**.

1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 2-16-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/16/95 BILL NO. SB 212 NUMBER 3

MOTION:

DPAA - 2nd -

(Lost DPAA Reconsidered - amendment added - 2nd DPAA)

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/16/95 BILL NO. SB 212 NUMBER 4

MOTION: DPAA - Bishop

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 2/16/95
BILL NO. SB 216

Page 3 ; follows line 11

Insert: (e) If a defendant asserts a nonparty defense, all nonparties whom the defendant alleges cause in whole or in part, the claimants injuries, will be notified of the allegations by mailing the defendants answer to them at their last known address using certified mail, return receipt requested.

BILL NO	REFERRED	HEARING	OTHER CONSIDERATION DATES	EXECUTIVE ACTION/DATE/VOTE	REREFERRED	DATE READ
	1/23	3/01		CONCUR AS AMENDED 3/15 VOTE: 18-1		3/16
SB0132	BISHOP, AL		GENERALLY REVISE ESTATE AND TRUST LAW			
	2/20	2/28		CONCUR 3/2 VOTE: 18-0		3/04
SB0133	CHRISTIAENS, CHRIS		REDUCE JURORS IN CIVIL ACTION FROM 12 TO 9 AND PEREMPTORIES FROM 4 TO 3			
	1/25	3/02		TABLED ON 03/13 VOTE: 15-3		
SB0143	BAER, LARRY		REJECT FEDERAL MANDATES NOT DERIVED FROM ENUMERATED FEDERAL AUTHORITY			
	1/23	2/06	TIE VOTE 3/2 9-9	CONCUR AS AMENDED 3/22 VOTE: 12-6		3/23
SB0165	AKLESTAD, GARY		AMEND LAW RELATING TO AMENDED PETITION FOR POSTCONVICTION RELIEF			
	1/27	3/01		CONCUR 3/1 VOTE: 17-0		3/01
SB0174	JACOBSON, JUDY		EXTEND & REVISE LOCAL CITIZEN REVIEW BOARD PILOT PROGRAM			
	2/01	3/07	POSTPONE ACTION 3/15	CONCUR 3/22 VOTE: 17-2		3/22
SB0175	VAN VALKENBURG, FRED		IMMUNITY FOR STATEMENTS MADE IN SEXUAL OFFENDER TREATMENT PROGRAMS			
	1/27	3/09		TABLED ON 03/09 VOTE: 15-1		
SB0185	VAN VALKENBURG, FRED		GENERALLY REVISE HABITUAL TRAFFIC OFFENDER PROCESS			
	1/27	3/02		CONCUR AS AMENDED 3/13 VOTE: 18-0		3/13
SB0189	WELDON, JEFF		REVISE INPLIED CONSENT LAWS			
	2/20	3/02		CONCUR AS AMENDED 3/13 VOTE: 16-1		3/13
SB0192	VAN VALKENBURG, FRED		PROSECUTOR SERVICES COORDINATOR'S SALARY SAME AS FULL-TIME ATTORNEY'S			
	2/16	3/03		VOTE:		
SB0206	BURNETT, JIM		REVISE LAWS ON INVESTIGATION AND REMOVAL OF CHILD IN SUSPECTED CHILD ABUSE			
	2/20	3/08		CONCUR AS AMENDED 3/21 VOTE: 11-8		3/22
SB0211	KEATING, TOM		RE: PROPERTY OWNER'S LIABILITY TOWARD PERSONS USING PROPERTY FOR RECREATION			
	2/20	3/03		CONCUR AS AMENDED 3/9 VOTE: 15-1		3/10
SB0212	BISHOP, AL		PROCEDURAL SAFEGUARDS FOR JOINT AND SEVERAL LIABILITY DETERMINATIONS			

BILL NO	REFERRED	HEARING	OTHER CONSIDERATION DATES	EXECUTIVE ACTION/DATE/VOTE	REREFERRED	DATE READ
	2/20	3/03		CONCUR 3/13 VOTE: 16-2		3/15
SB0218	CHRISTIAENS, CHRIS 2/15	3/02	REVISE LANDLORD TENANT LAWS	CONCUR 3/15 VOTE: 17-2		3/16
SB0229	HARGROVE, DON 2/02	3/06	CRIMINAL FORFEITURE OF PROPERTY FOR DRUG OFFENSE; OFFENSE TO POSSESS	CONCUR AS AMENDED 3/14 VOTE: 18-1		3/15
SB0237	BISHOP, AL 2/20	3/14	STATE OPEN CONTAINER LAW	TIE VOTE 3/22 VOTE: 9-9		
SB0272	GROSFIELD, LORENTS 2/06	3/08	REVISE FILING REQUIREMENTS OF SURVIVING SPOUSE OF JOINT TENANCY	CONCUR 3/15 VOTE: 19-0		3/16
SB0278	BROOKE, VIVIAN 2/15	3/07	REVISE DOMESTIC VIOLENCE LAWS	CONCUR 3/9 VOTE: 18-0		3/13
SB0286	FRANKLIN, EVE 2/15	3/03	COURT-ORDERED COSTS AND COUNSEL FEES IN PATERNITY PROCEEDINGS	CONCUR 3/9 VOTE: 18-0		3/10
SB0292	BROWN, BOB 2/20	3/20	WOMAN'S RIGHT TO KNOW CONCERNING ABORTION	CONCUR 3/22 VOTE: 12-7		3/22
SB0297	DOHERTY, STEVE 2/15	3/08	MANDATORY INSURANCE VIOLATIONS PENALTIES	CONCUR 3/15 VOTE: 17-2		3/16
SB0316	BISHOP, AL 2/20	3/14	PROVIDE DUI SENTENCING ENHANCEMENT FOR DUI	CONCUR AS AMENDED 3/22 VOTE: 18-0		3/23
SB0333	BISHOP, AL 2/20	3/14	REVISE PROBATIONARY DRIVER'S LICENSE PROCEDURES UNDER DUI LAWS	CONCUR AS AMENDED 3/22 VOTE: 18-0		3/23
SB0340	CRIPPEN, BRUCE 2/22	3/06	AUTHORIZE LIMITED LIABILITY PARTNERSHIPS	CONCUR AS AMENDED 3/14 VOTE: 19-0		3/15
SB0353	HALLIGAN, MIKE		REVISE GUARDIAN AD LITEM IN FAMILY MATTERS/SPECIAL MASTERS IN CRIMINAL CASES			

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on March 3, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 192, SB 211, SB 212, SB 286
Executive Action: NONE

{Tape: 1; Side: A}

HEARING ON SB 212

Opening Statement by Sponsor:

SEN. AL BISHOP, SD 9, gave the history behind SB 212 and said there has been an attempt to deal with a defendant who is 50% or less responsible for the plaintiff's injury and is only obligated to pay to the extent of the liability. In cases where a defendant tries to show during the trial that there are other culpable parties who are not named in the suit, the supreme court has said there is a need for some procedural safeguards. The intent of SB 212 was to provide for those safeguards.

He described the recent case which initiated the bill. In Wetch v. Unique Concrete Co. the plaintiff was injured by falling into an excavation the defendant had dug at the back door. At the beginning the plaintiff, her employer and the defendant had talked about how to handle the excavation. The defendant had recommended that the door be barricaded. The employer agreed to take care of it, wanted to keep the door open for ventilation and ultimately did not take care of it. The plaintiff walked out the back door and was injured and sued Unique Concrete. The court held that inasmuch as she was covered by Workers Compensation through her employment, she could not sue the employer. She was able to sue Unique Concrete and collect $200,000 since existing statute provides that the conversation between the three of them could not be shown because the employer was immune.

Proponents' Testimony:

John Alke, Montana Liability Coalition, said the organization he was representing was formed to spearhead tort reform. He submitted history to explain why the bill was important. Prior to 1975 in a negligence action in Montana there were two dominating common law doctrines. The first was contributory negligence--if the plaintiff was at all responsible for the injury, the plaintiff was absolutely barred from recovery. The second was joint and several liability--the plaintiff could choose which defendant would pay the judgment without any respect to comparative fault. In 1975 Montana adopted a system of comparative fault. Under this system, the plaintiff can recover, even if the plaintiff is much more negligent than any of the individual defendants, that portion of the damages not attributable to their own fault from the other defendants. How much, is what this bill intended to address.

He said that Montana made a mistake when it adopted comparative fault because it abolished contributory negligence and ignored joint and several liability. The result was that between 1975 and 1987, comparative fault existed in theory, but not in fact.

He gave an example to illustrate. In 1987 Montana enacted a 50% rule which means that unless a defendant is primarily responsible for an accident (51% or more) a defendant is only liable for their share of the fault. The Newville v. Department of Family Services case struck down the application of the 50% rule to nonparties because of lack of procedural guarantees of a fair trial to the plaintiff. The idea was that the plaintiff would not know until the middle or end of the trial who the defendants were going to blame and it was unclear who had the burden of proof. Newville did not invalidate on a constitutional basis the 50% rule, it only invalidated an application of that rule in the case of nonparty defendants. The effect was that essentially the plaintiff can decide whether the 50% rule applies or not and whether to settle with any of the defendants before trial. Further, if fault cannot be allocated to a defendant, there is a question whether or not that defendant's negligence is even admissible in a plaintiff's trial against another defendant.

The Wetch case said, "No." In that case the plaintiff called the contractor defendant to the witness stand and asked if the defendant knew there was an unsafe condition and if it was true that the contractor undertook no measure to be sure no one would fall out the door and be injured. He was prohibited from saying that the reason he took no action was the conversation with the employer and the plaintiff in which the employer promised to lock the door and put a notice on it and he did not do any of those preventive measures. The court held that since the employer was immune under the laws of workers compensation, allocation of fault could not be given, thus evidence of the employer's negligence was inadmissible.

SB 212 would correct Newville and provide the procedural guarantees the supreme court wanted. If it passed, the defendant would be required in their answer to advise the plaintiff who they would tend to blame for the accident. It would provide that a defendant's lawyers would have the burden of proof that another defendant was responsible for the injury. The plaintiff would not have to disprove it. The bill specified that a defendant would not be in the lawsuit because they settled beforehand, any findings against that defendant were irrelevant. The only reason to discuss that defendant's fault would be for the purposes of fairly determining another defendant's fault.

The basis for the ruling in Wetch was that there were two conflicting statutory provisions; one prohibited an allocation of fault to an employer and the second sentence was being struck in the amendment. He refuted in advance the opponent's objection to the bill that they were being unfair in setting up a situation for blaming parties without actually naming them and giving them a chance to defend themselves. He said that was not true, because as a matter of law a settled defendant or an immune defendant cannot be named. He suggested three questions for the committee to ask of the opponents:

1. Isn't it true that the defendant cannot name a settled party. (They have no choice but to answer yes, that is true.)

2. Isn't it true that the defendant cannot name an immune party. (They have no choice but to say yes, that is true.)

3. Isn't it true that Wetch held that evidence of fault of a party to whom fault cannot be allocated is inadmissible. (They have no choice but to answer that that is true.)

The Wetch decision is **EXHIBIT 1.**

{Tape: 1; Side: A; Approx. Counter: 22.5}

Ward Shanahan, Farmers Insurance Group of Companies, supported the bill.

Jim Tutwiler, Montana Liability Coalition (MLC), said, in support of SB 212, that MLC had been very active in getting the 1987 bill passed because they were concerned that the business community and anyone who had resources, including local government agencies would be vulnerable to large damage awards. He said the Newville and Wetch cases posed a serious threat for the 1987 rule and that the bill being considered was designed to follow the instructions and the guidance which were given in the supreme court decision to restore the joint and several liability statute back where it was.

Ron Ashabraner, State Farm Insurance, urged the committee to act favorably on the bill.

David Owen, Montana Chamber of Commerce, made two points dealing with the joint and several liability statute in that it had stood the test of time with both Republican and Democrat majorities under several challenges. The second point was that the intent was to restore a sound principle at the encouragement of many small businesses.

Tom Hopgood, Montana Independent Bankers Association, rose in support of SB 212.

John Cadby, Montana Bankers' Association, said all the bankers agreed on this bill.

Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration, supported SB 212.

Jacqueline Lenmark, American Insurance Association (AIA), supported the bill.

Don Allen, Montana Wood Products Association, supported SB 212.

Charles Brooks, Billings Chamber of Commerce and Yellowstone County Board of Commissioners, said the bill would lessen the risk and costs of doing business in Montana. It would eliminate some of the inequities which had been discussed.

Sue Weingartner, Montana Solid Waste Contractors, Montana Trial Lawyers, Montana Optometric Association, urged support of SB 212.

Robert White, Bozeman Chamber of Commerce, said this was the responsibility bill and urged the committee to pass it.

Riley Johnson, National Federation of Independent Businesses, urged the passage of the bill.

Gail Abercrombie, Executive Director, Montana Petroleum Association, supported this legislation.

Steve Turkiewicz, Montana Auto Dealers Association, urged support of this bill.

Marie Durkee, Montana Liability Coalition and Executive Director, Montana Taverns Association, supported SB 212.

Jim Kembel, City of Billings, supported the legislation.

Don Hutchinson, Division of Banking and Finance, recommended support for the bill.

Michael Keedy, Montana School Boards Association, said that the testimony both pro and con regarding this bill is complex and potentially confusing. For simplicity's sake, he felt the committee should keep in mind that SB 212 would preserve the desirable features of Montana's present law in the area of joint and several liability and it would correct some constitutional flaws recently identified by the Montana Supreme Court. They urged favorable consideration.

Tom Harrison, Montana Society of CPA's, also supported SB 212.

Mona Jamison, Doctor's Company, stood in strong support of the bill. **EXHIBIT 2**

Stan Kaleczyc, Montana Municipal Insurance Authority, asked the support for the bill so that only a fair amount would be paid by cities and towns when they are held liable in injury cases.

REP. BILL TASH, formerly representing the Hospital Associations, rose in support of the legislation.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association (MTLA), rose in opposition to SB 212. He submitted written testimony. **EXHIBIT 3**

He also submitted copies of letters from attorneys in opposition to SB 212, **EXHIBITS 4 - 14**

He made clear that MTLA both believed and was convinced that this bill was unconstitutional and that it would not correct the constitutional deficiencies pointed out in the Newville case. He also said that MTLA was not asking the committee to trust them, but rather to trust themselves even though the issues bordered on the complex. He said that they were some of the most basic issues involved in law and that was what the supreme court ruled on. He then quoted from his written testimony and from the Montana Supreme Court decision in the Newville case.

He said this bill was not risk-free because once the court found that the language in the statute [27-1-703(4), MCA] was unconstitutional, the court had to reach a second decision in determining whether the whole statute was unconstitutional. The court said it was not essential to the 1987 amendment which is contrary to what the proponents were saying. He said that meant that if the case went back to the supreme court and the supreme court again found that nonparties cannot be brought in, the court would have to revisit whether this language is so central to the 1987 amendment that the entire statute would have to fall.

He said that the drafters and proponents of the bill "simply blew it." They had the means to take care of the problem identified in Newville and they got impatient. In returning to the original questioned proposed to be asked by **Mr. Alke,** following are his answers:

1. **Mr. Hill** said, "That's wrong. You can."

2. **Mr. Hill** said, "The fact is, you can." He referred to a second case, Brockie v. Omo Construction, and quoted from the supreme court decision.

3. **Mr. Hill** responded that was what happened in the Wetch case, but that **Mr. Alke** didn't elaborate that the Wetch case was a unique legal factual situation based on other language in the 1987 amendment that the court didn't stretch for an interpretation. It was the plain meaning of that workers compensation language in the 1987 amendment. The answer to the implied question whether there can be evidence of any immune party is that it is simply unavoidable. He gave an example to prove his point.

{Tape: 1; Side: A; Approx. Counter: 49.0}

The reason behind the 1987 language was the interaction of liability and workers compensation and employers and their immunity from suit when there is a work place injury. He asked the committee to investigate that. He said that when the proponents gave the history of contributory negligence and comparative negligence, they left out the fact that contributory

negligence was a complete bar. If the plaintiff was completely innocent, he could sue any of the defendants and receive the entire recovery from them. The defendant could not receive contribution from another defendant. Comparative negligence wasn't a generous outpouring of sympathy for the plaintiff but was an attempt to bring in other people and get a share of money from the deepest pockets. The plaintiff always pays the cost of the defendant who can't pay under comparative negligence .

He summed up two problems identified in Newville by describing the process in that case. One had to do with bringing in a witness who was significantly at fault at the end of the trial after not having been at the trial or represented prior to the judgment being handed down. The second issue was requiring the plaintiff in the case to defend somebody else who was not in the case. Those were violations of substantive due process.

Norm Grosfield, Helena Attorney, was a former administrator of workers compensation and involved in workers compensation litigation since 1973. He said he wanted to address a concern that the committee and the proponents should have regarding page 2 and the amendment which would affect lines 20 - 24.

{Tape: 1; Side: B}

He said the workers compensation system was based on the principle of the exclusive remedy rule in existence since 1915. That means that if an employer provides workers compensation, he cannot be sued in tort no matter how negligent the employer was. Up to this point, the courts have been consistent in supporting that principle. Removing the language on line 24 would provide the vehicle for courts to negate the exclusive remedy rule; therefore, the employers and their insurers would be subject to potential tort liability in addition to workers compensation coverage.

Lon Dale, Missoula Attorney, testified as an opponent to SB 212 and gave history behind the bill. A practice, which he termed "a knee-jerk" reaction has been occurring in response to Montana Supreme Court decisions which restricted contribution. He outlined the history of that opinion. He said the effect is that every two years the legislature changes the law making it difficult for attorneys and creating a great deal of work for them. He said this bill would change something that doesn't need to be changed. He said they would like to have status quo and continuity. He gave some case examples of what happens when the law is changed. He said the Brockie V. Omo case would be tried for the third time because of changes in the judicial process.

He suggested that the entire bill was unnecessary. He believed that when the Newville and Brockie decisions were read in conjunction with each other that would provide the course of action needed. He said that page 2, line 4 of the bill included third party defendants which were not struck out by the court.

He said a third party defendant could be brought in under the civil rules of procedure if it was believed that third party was responsible for some of the damages claimed by the plaintiff against the client. He said that principle had existed since the adoption of the rules of civil procedure in the 1960's and was the solution.

He said the important thing is the determination of negligence. That was referenced in the dissent in the Brockie decision to add a course of action that could be used. He quoted that dissent by Judge Weber.

{Tape: 1; Side: B; Approx. Counter: 14.9}

Questions From Committee Members and Responses:

REP. BILL TASH asked, in the Senate Judiciary Committee's deliberation on the bill, how much consideration they gave the Brockie case.

Mr. Alke said no weight was given to the Brockie case because the language which was cited was from the dissent. Dissents don't count because they lose. The ruling of the court was the majority opinion.

REP. TASH asked about the language which was amended out on page 2, lines 21 through 25.

Mr. Alke said the opponents failed to tell the committee that the exclusive remedy rule for workers compensation is a constitutional provision. Statutes don't modify constitutional provisions. This provision deals only with workers compensation in a peripheral manner.

REP. DUANE GRIMES asked how a dissenting opinion in a court decision could be used to resolve the issue.

Mr. Dale said the issue was not an issue in the Omo decision. The issued raised in the defense was not the issue. The issue was that it had been tried twice and the plaintiff was dissatisfied with the verdict and wanted to seek a greater percentage. He described how it worked out in that case. He said the statement, called a dicta, by the dissenting judge is not controlling as far as the issue in the case, but it is a statement of how he felt that particular issue should be addressed. He said that was the proper course of action which the supreme court had not dealt with in a case [as yet].

REP. GRIMES asked if the dicta set a course of action.

Mr. Alke fundamentally disagreed with **Mr. Dale**. He said that was not dicta. Dicta is language in the majority opinion which is not central to the holding of the court. Language in a dissent is dicta, he said. He said he believed **Mr. Dale** was asking the

committee to do nothing because the supreme court would eventually get it right. But he suggested that the legislature has the right in dealing with simple rules of liability to tell the supreme court what the appropriate method for allocating fault is in a system of comparative fault. He said that it was a "red herring" to describe the bill as unconstitutional and that Newville said that no procedure would work. He said that was not true and that the opponents had selectively read from the opinion. He read for the committee what the holding of the court was, "We conclude that section 27-1-703(4), MCA, unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard." The court outlined other states which have the safeguards and included Indiana after which Montana's statute is modeled. Further quotes from the decision was, "consideration of these procedural safeguards should have been considered by the Montana Legislature at the time of enactment of the statute."

REP. GRIMES asked if the charges raised by the opponents that this was a make-work bill for attorneys was true.

Mr. Alke refused to answer because he said it did not dignify a response. He said the source of law was from the Montana Supreme Court or the higher court and the legislature. He said the legislature has a superior right to establish the law except in areas of constitutional law. He pointed out that he was the only lawyer for the proponents.

REP. DANIEL MC GEE asked what people swear to when they take the stand. (He also expressed his strong anger and sentiment about what was occurring in the hearing as legal posturing and hypocritical.)

Mr. Hill answered, "To tell the truth, the whole truth and nothing but the truth."

REP. MC GEE asked if what is done in the legal profession today fits that sworn statement.

Mr. Hill answered that what he believed they do in the court system is the best method that humanity had ever decided to determine what the truth, the whole truth and nothing but the truth is. He said he knew that he suffered from the public perception that what was going on was legal posturing and mercenary hypocritical. His opinion was that the attorneys genuinely believe strongly in the system and that was behind what was going on at this hearing and in the court system. He believed that a lack of understanding and appreciation of what goes on in the court system was the cause of the negative public opinion about the court system.

REP. MC GEE asked why in the Wetch case the contractor could not tell the court the whole truth which included the conversation with the employer.

Mr. Hill answered it by asking him to look at page 2, line 20 of the bill. The court was applying the clear imperative that was embodied in law. He quoted that section. He summarized that the court specifically said there was nothing ambiguous in it, they had no choice because of the legal prohibition. He suggested the reason that provision was there was that they wanted it included because of the legal complications in relationship between tort liability and workers compensation.

REP. MC GEE repeated back that the court would not allow the truth because of that section of statute.

Mr. Hill answered that in that respect, that was what he was saying.

REP. MC GEE asked **Mr. Alke** if the reason in the Wetch case the contractor could not testify that he had had a conversation with the employer was a result this statute.

Mr. Alke said that was not true. He said it was not true because this same question was in front of the federal courts and they held that the question of the allocation of negligence had nothing to do with proximate cause and that the evidence of the other party should have been admitted to permit the defendant in court to prove that he was not a proximate cause of the accident. He said that was the ruling of the federal court in Montana on this specific statute and this specific question. The Montana Supreme Court said it was not bound and did not like the U. S. federal court's ruling and it issued the ruling in the Wetch case.

REP. LOREN SOFT expressed his anger and negative response to the allegation that the legislature was responsible for the confusion since they change the laws. He asked about the assignment of negligence in the Wetch case and wanted to know what the responsibility or negligence was of the plaintiff.

Mr. Hill answered that the reason for the exclusion of her responsibility was the no-fault compensation system. That system says that injured workers are deprived of certain rights in exchange for making their activities no fault. Some would say that this wasn't a workers compensation case, but there is a fault system and a no-fault system and common parties running side by side. He said he felt it was incorrect to say the two systems were completely independent and he believed that was what was being said with the Wetch amendments.

He disagreed with **Mr. Alke** that the Constitution was what provides an exclusive remedy to employers. He cited article 2, section 16 of the Constitution to prove his point and said it is guaranteed by statute. The dissent in Brockie is not neutered by the fact that is was a dissent. Newville was a unanimous supreme court opinion. The three dissenters in Brockie talked about

Newville because the other four justices disagreed with them; they disagreed on an entirely different issue, he said. He said there was an assessment of fault in that case and suggested that they ask **Mr. Dale** about that.

REP. SOFT was concerned that he had heard no testimony among the attorneys which was in agreement and then the legislature was being asked to solve the problem.

Mr. Hill pointed out a distinction that 80 - 90% of the bulk of laws, which he questioned as being necessary, in the state were not submitted by the unpopular attorneys who he represented.

REP. JOAN HURDLE asked if it was considered a good business practice for a contractor to assign his safety procedures to a chiropractor in a casual conversation. [She was referring to the Wetch case.]

Mr. Brooks answered that in every case the business person must bear some responsibility. He said the contractor did bear some responsibility as far as safety was concerned.

REP. HURDLE wondered if she understood that in the proximate cause of the accident, if this law passed, everybody would be sharing the blame.

Mr. Alke answered that if this law passed and the Wetch case were retried, when the contractor was on the stand and asked if he knew it was an unsafe condition and answered, "yes," and then was asked if he had personally undertaken any safety measure, and then answered, "no," he would then be allowed to give a reason for not having taken the safety precautions.

REP. HURDLE asked if that would have the effect of partially exonerating that contractor from his responsibility to public safety.

Mr. Alke answered that it would not because he would still be found liable for the fact that he didn't do something else but he could explain why he didn't do something else. This is a question of allocation, not black and white--all responsible or not responsible. The jury should be able to allocate the percentages of blame. Without the bill, he could not say that there was another party involved who was also to blame.

REP. HURDLE said it seemed with the bill that nobody would get the blame.

Mr. Alke said there were only three people involved and the court said that the person who was sued couldn't even talk about what the third person did wrong.

REP. HURDLE said she thought the contractor was responsible for safety on his job.

Mr. Alke said he was but the reason she fell into the job site was because the employer wouldn't barricade the door. The contractor doesn't own and control the employer's building.

REP. HURDLE thought the answer to her question was that the proponents felt it was okay for an employer to assign his responsibility to somebody else in a casual conversation.

REP. DEB KOTTEL referred to page 3 and the Senate amendments and asked why that was added.

Mr. Alke said that Senator Halligan reviewed the Newville case and one issue was that the nonparty might not even know that they were being blamed in the trial. During the oral arguments, the supreme court indicated that concern and the Senator wanted a provision added to notify the person being blamed.

REP. KOTTEL referred to page 3, lines 7 through 10, saying that a finding of negligence was not presumptive or conclusive and asked if it was admissible in a subsequent action.

Mr. Alke did not believe it would be because unless that party participated in the case, the party had no opportunity to explain his view of the allocation.

REP. KOTTEL discussed joint and several liability and asked if the bill dealt with all joint and several....

Mr. Alke interrupted, "No, there is an exception in the existing joint and several statute that said it did not apply to people acting in concert." He explained this.

REP. KOTTEL asked if this only affected those tortfeasors who were found to be 50% or less negligent.

Mr. Alke said that was correct.

REP. KOTTEL presented an example of a case involving $100,000 in damages with a plaintiff with 33.3% contributorily negligent and an immune defendant tortfeasor also liable for 33.3%. Then the last defendant was found to be 33.3% negligent. She asked for a comparison of what would happen if it did not pass with what would happen if it did pass.

Mr. Alke replied that if the bill did not pass, the defendant remaining would be liable for 66% of the plaintiff's damages because there could be no allocation of fault to the immune defendant. If the bill passed, he would be liable for only 33.3% to share with all those allocated by the jury.

REP. KOTTEL asked if **Mr. Hill** was in agreement with her last three questions.

Mr. Hill said he could not venture an answer to the first question. He did say that it is a real problem in the Wetch amendment and he handled that in his written testimony. He said if the bill is passed the legislature would be saying what should have happened in the Wetch case.

REP. KOTTEL restated her second question and **Mr. Hill** agreed that was his understanding.

REP. KOTTEL asked if he agreed with the answer to the third question and asked why that would be wrong.

Mr. Hill disagreed with **Mr. Alke** and explained why. He said that **Mr. Alke's** answer presumed that what was talked about in Brockie doesn't apply.

{Tape: 2; Side: A; Comments: Part of the answer was missed in changing the tape.}

He said that with a set of assumptions, **Mr. Alke's** answer was correct with the caveat of the deduction for a settlement. He recommended that the committee read the cases and decide for themselves which set of assumptions needed to be the most controlling.

REP. KOTTEL asked if it was also the understanding that when there was a nonparty defendant the issue becomes who would defend that nonparty defendant. She suggested that it might happen that the jury would allocate inappropriately the blame between the two parties.

Mr. Hill responded that the supreme court in Newville said exactly that. He described another consequence of a bill like this passing.

REP. KOTTEL said no one forces a plaintiff to settle with defendants, **Mr. Hill** agreed.

REP. LINDA MC CULLOCH requested an explanation the importance of the dissent in the Brockie case.

Mr. Hill gave his opinion that the reason for a majority decision and a dissent in the Brockie case did not have to do with what the dissent said about Newville. What split the justices in the Brockie case wasn't what the dissent said about Newville. Secondly, Newville was a unanimous opinion; Justice Weber, who authored the opinion, and the other two dissenters, Turnage and Gray, joined in the opinion. To say that the dissent doesn't count is to say that in a unanimous supreme court decision, there is no reason to follow that, because all of the judges may have done something different. In Brockie the dividing issue was not how they interpreted Newville and what the three dissenters said was the way they suggested that future cases be handled. They did not back off from comparative negligence. The bill was not

about comparative negligence, he said and if the committee believed that was what the bill was about and the section were struck, the whole statute would collapse, he said. "Every supreme court justice knows that comparative negligence is going to hang around, the question is how do we handle that. Do we ascribe negligence to people who are outside the courtroom or do we fine tune the statutes in terms of contribution in negligence to make them be in the courtroom and still ascribe them negligent even if they are immune?" he asked. He concluded that the fundamental adversarial system works.

REP. WILLIAM BOHARSKI could not understand why they were going back and forth between the terms, liability and negligence, in the bill.

Mr. Alke said that the reason there are sometimes references to liability and sometimes references to negligence was that sometimes there is discussion of their negligence, but they would not necessarily be held liable. The term liability is used where the purpose of the action is actually to say that they owe a certain amount as a result of a judgment. Other times, they want to talk about his negligence, but since he actually would not be held liable in a lawsuit, the word negligence is used.

REP. BOHARSKI specifically spoke to lines 20 through 24 on page 2 being removed.

Mr. Alke replied that the 1987 language was poorly drafted and it had been a "festering sore" until the Wetch decision. The language was in there because someone in 1987 took the advice which was given [in the legislature] to address the exclusivity of remedy in this statute. He said that was wrong; the exclusivity of remedy is in the constitutional provision. There are two totally conflicting sentences in the statute. He directed the committee to the portions which did this.

REP. BOHARSKI asked if that meant that as a result of that language and the possible conflict in the law, the supreme court looked at the language on lines 19 through 24 and said they could take a look at that contract.

Mr. Alke said that was correct.

REP. BOHARSKI then asked about the new language as saying that they can look at that consistent with the top of page 2.

Mr. Alke said that was correct.

REP. BOHARSKI asked if the language on page 3 dealt with the ability of someone to -- who's going to do the defending, who's going to do the prosecuting, who's going to pay the attorney fees, etc. -- in determining the negligence even though they know that person is not liable because he is constitutionally exempt.

Mr. Alke said that was correct.

{Tape: 2; Side: A; Approx. Counter: 13.6}

Closing by Sponsor:

SEN. BISHOP said in closing that it was plain that some action must be taken. He addressed the suggestion that the supreme court would not look on anything done in the legislature favorably. He said that the court pointed out what the legislature must do in the Newville case and he cited the source of that opinion. He said he thought the Wetch case was not fair and that it was up to the legislature to do something about it.

HEARING ON SB 286

Opening Statement by Sponsor:

SEN. FRANKLIN, SD 21, said SB 286 was brought to her by an attorney and former justice of the peace as a measure to deal with pre-trial costs. It would put in statute that when a paternity case is determined, the judge may include an order for pre-trial costs.

Proponents' Testimony:

Jim Elshoff, Great Falls Attorney, said there was no provision within the current act for recovery of attorney fees and court costs. He submitted written testimony along with a copy of the Parentage Act. **EXHIBIT 15**

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. KOTTEL asked the sponsor about the fiscal note referring to the possible additional costs to the district court and wanted to know what it might cost the counties. The sponsor referred the question.

Mr. Elshoff said guardian ad litem fees were presently in the statute. He believed this would not have any impact on the counties per se. Without the legislation, the petitioner who brings a lawsuit currently may be required to apply for AFDC benefits and that the impact would be the same if the committee did nothing. Whatever that impact would be would be lessened if they were able to go to the other parent to get child support from them.

REP. KOTTEL asked if the court would take into consideration whether or not the party was financially able to pay the costs.

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 3/3/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓ 9:30	~~✓~~	
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓	9:20 ~~✓~~	
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓	9:25 ✓	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 3/3/95
SB 212

JANICE WETCH, Plaintiff and Respondent, v. UNIQUE CONCRETE CO. a Montana Corporation, Defendant and Appellant.

No. 94-176.
Submitted on Briefs October 28, 1994.
Decided January 18, 1995.
52 St.Rep. 5.
___Mont.___.
___P.2d___.

NEGLIGENCE - TORTS - STATUTES. Plaintiff brought suit for injuries she received in a fall at her workplace where defendant was doing remodeling work. Plaintiff filed a motion in limine to exclude consideration by the jury evidence of her employer's negligence and the district court granted the motion. Following trial, the jury apportioned negligence 51% to defendant and 49% to plaintiff and awarded damages. Defendant appealed. The Supreme Court held:

1. NEGLIGENCE - TORTS. Statute provided that trier of fact, in attributing negligence, may not consider or determine any amount of negligence on part of injured person's employer or co-employee to extent that such employer or co-employee has tort immunity under workers' compensation act. § 27-1-703(4), MCA (1987).

2. NEGLIGENCE - TORTS. Plaintiff's employer was immune from tort liability for plaintiff's injuries because plaintiff was covered by and received benefits under employer's workers' compensation insurance.

3. NEGLIGENCE - TORTS. Statute expressly prohibits any evidence of employer's negligence going to the jury where employer is absolutely immune from tort liability, and any amount of employer's negligence which caused or contributed to plaintiff's injuries cannot be considered or determined by the jury; employer's negligence is not part of liability or damages equation.

4. STATUTES. Supreme Court is not constrained to follow interpretations of state statutes by federal judiciary, especially where statutory language has not been previously interpreted by Supreme Court.

5. STATUTES. Where no constitutional challenge has been made, it is not prerogative of court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate and district court correctly applied statute in granting plaintiff's motion in limine.

Affirmed.

Appeal from the District Court of Custer County.
Sixteenth Judicial District.
Honorable Kenneth R. Wilson, Judge.

For Appellant: Calvin J. Stacey, Stacey & Walen, Billings.

For Respondent: Thomas M. Monaghan, Lucas & Monaghan, Miles City.

JUSTICE NELSON delivered the Opinion of the Court.

Unique Concrete, Co., (Unique) appeals from a special jury verdict in favor of Janice Wetch (Janice) finding that Janice's personal injuries were caused 51% by Unique's negligence and 49% by Janice's own negligence and awarding total damages of $200,000. Unique contends that the District Court erred in granting Janice's Motion in Limine restricting evidence of negligence attributable to Janice's employer, Dr. William Wallick (Dr. Wallick). We affirm.

ISSUE

The issue on appeal is whether the District Court properly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

FACTUAL AND PROCEDURAL BACKGROUND

At the time she was injured, Janice was the full time receptionist, office worker and assistant to Dr. Wallick, a Miles City chiropractor. Janice had worked for Dr. Wallick, first on a part-time basis and later, full time, since August 1984. She and Dr. Wallick were the only two persons who worked in his small, Main Street office building.

In 1989, desiring to add space to his offices, Dr. Wallick hired a local Miles City contractor to remodel the building. Prior to the remodeling, the office building had two doors, one at the front of the building facing Main Street, primarily used by patients, and another door at the rear leading to the parking lot. The rear door was routinely used by Dr. Wallick and Janice. As part of the remodeling project, Unique was hired as one of the subcontractors and was responsible for removing the concrete steps outside the rear door of the building.

Before Unique began work, Larry Kuchynka (Larry), Unique's president, had a conversation with Dr. Wallick, in Janice's presence, in which Larry expressed his concern about the safety hazard posed by the removal of the steps outside the rear door. Larry suggested various measures that could be taken to mitigate the danger, including barricading the door. Dr. Wallick did not want to barricade the door because of the need for ventilation. However, he assured Larry

that a warning sign would be placed on the door, that the door would be dead-bolted during regular business hours and that he (Dr. Wallick) "would take care of it." Relying on Dr. Wallick's statements, Unique did nothing to secure the door and proceeded to remove the concrete steps leaving a vacant hole five to six feet deep under the door where the steps had been.

Janice testified that she recalled discussing the door situation with Dr. Wallick and that she tried to keep the door locked. Moreover, knowing that the steps had been removed, during the week before her accident, Janice changed her routine and began using the front door to enter and leave work. Nonetheless, at about noon on September 25, 1989, out of forgetfulness or force of habit, Janice opened outward the rear door of the office, stepped into the five to six feet hole where the steps had been, and was seriously injured. Janice subsequently received benefits through workers' compensation insurance carried by Dr. Wallick.

In November 1991, Janice filed her complaint against Unique alleging negligence and seeking special and general damages for her injuries. Prior to trial, in its motion for summary judgment, Unique argued that Dr. Wallick's failure to secure the door was negligence and was an independent, superseding, intervening cause which absolved Unique from liability for Janice's injuries. In response, based on § 27-1-703(4), MCA, (1987), Janice filed her Motion in Limine to exclude from consideration by the jury argument or evidence of any conversation between Larry and Dr. Wallick that Wallick would keep the rear door locked during construction; that Dr. Wallick forgot to lock the door approximately one and one-half hours before Janice's fall; and that Dr. Wallick was solely or partially at fault with regard to Janice's fall. Janice's motion was briefed and argued, and, on the first day of trial was granted by the District Court.

Trial began in February 1994. Janice's attorney called Larry and elicited testimony to the effect that he (Larry) was concerned about the hazardous condition posed by the removal of the steps, that he discussed those concerns with Dr. Wallick in Janice's presence, that various measures could be taken to mitigate the danger, but that he (Larry) did nothing to secure the door. Pursuant to the District Court's order granting Janice's Motion in Limine, however, and despite Unique's offer of proof, neither Larry nor Wallick were allowed to detail their conversation about the necessity to barricade the rear door; that Dr. Wallick had refused to have the door barricaded; that Dr. Wallick had agreed to lock the door; and that Larry had relied on Dr. Wallick's statements in that regard as the reason why Unique did not take any measures to secure the door.

DISCUSSION

On appeal, Unique contends that because the District Court granted Janice's Motion in Limine, it was denied its right to a fair trial. Unique argues that the jury was precluded from hearing all of the facts as to how and why Janice's accident occurred and that it was unable to present factual support for its defenses that it was not negligent and that, even if it was, its negligence was not the proximate cause of Janice's injuries, Dr. Wallick's negligence being an independent, superseding and intervening cause.

Janice maintains that the District Court correctly granted her Motion in Limine and kept the offered argument and evidence from the jury because amendments to § 27-1-703, MCA, made by the 1987 legislature, specifically removed from consideration and determination by the fact finder any amount of negligence on the part of the injured person's employer to the extent that such employer had tort immunity under Montana's Workers' Compensation Act. We conclude that the District Court's application of § 27-1-703(4), MCA, to prohibit the offered testimony and evidence from being considered by the jury was correct.

The issue raised in this case is one of first impression. While this Court recently held certain portions of § 27-1-703(4), MCA, (1987) unconstitutional, *Newville v. State of Montana* (1994), ___ Mont. ___, 883 P.2d 793, our decision in that case did not address the language of the statute at issue here, nor is there any constitutional issue raised in this appeal with respect to that part of the statute. Rather, the issue here involves one of merely applying the clear and unambiguous requirements of the statute to the facts before the court.

[1] In pertinent part, § 27-1-703(4), MCA, (1987), provides:

> (4) ... However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government.

That language, along with other provisions, was added to § 27-1-703, MCA, by the 1987 Legislature as a part of its tort reform legislation. See *Newville*, 883 P.2d at 799.

There is nothing ambiguous or unclear about the statutory language at issue. The legislature has provided that the fact finder may not "consider or deter-

mine any amount of negligence" on the part of the injured person's employer to the extent the employer has tort immunity under the Workers' Compensation Act.

[2] It is undisputed that Dr. Wallick was Janice's employer and that he is immune from tort liability for her injuries because she was covered by and received benefits under his workers' compensation insurance. See, Article II, Section 16, Constitution of the State of Montana and § 39-71-411, MCA. Unique, nevertheless, argues that it should be able to completely absolve its own liability by offering evidence, argument and instruction to the jury that it did not secure the rear door because Dr. Wallick said he would take care of it; because Dr. Wallick refused to allow Unique to barricade the door; because Dr. Wallick negligently failed to secure the rear door himself; and because Dr. Wallick's negligence was the proximate cause of Janice's injuries.

[3] Obviously, Unique can only prevail in that defense if the trier of fact is, first, allowed to "consider" evidence of Dr. Wallick's alleged negligent acts and omissions from testimony of what Dr. Wallick said he would do and from what he then actually did or failed to do, and, second, if the trier of fact is then allowed to "determine" from that evidence that it was Dr. Wallick's negligence, and not Unique's, that proximately caused Janice's injuries. That, of course, is precisely the sort of evidence that the statute expressly prohibits from going to the jury. Because Dr. Wallick is absolutely immune from tort liability for her injuries, *any* amount of his negligence which caused or contributed to Janice's injuries cannot be considered or determined by the jury. Dr. Wallick's negligence is simply not a part of the liability or damages equation.

[4] While the parties argue for and against the fairness of the statute and the rationale underlying its adoption, that is not the issue. Moreover, we have considered the authorities cited by Unique and do not find them persuasive. While Judge Battin's interpretation of the statutory language in *Weaselboy v. Ingersoll-Rand* (April 10, 1991) 10 Mont. Fed. Rpt. 41, differs from ours, we are not constrained to follow the interpretations of Montana's statutes by the federal judiciary, especially where the statutory language at issue has not been previously interpreted by this Court. The statutory prohibition is clear and unambiguous, and no argument has been advanced that the portion of the statute at issue is unconstitutional.

[5] Absent such a challenge, it is not the prerogative of this or of any other court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate. Accordingly, we are compelled to hold that the District Court correctly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

AFFIRMED.

CHIEF JUSTICE TURNAGE, JUSTICES GRAY, HUNT and WEBER.

EXHIBIT 2
DATE 3/3/95
SB 212

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

TO: House Judiciary Committee Members

FROM: Mona Jamison, Lobbyist for The Doctors' Company

RE: Senate Bill 212

DATE: March 3, 1995

The Doctors' Company insures approximately 675 of Montana's 1450 physicians for medical malpractice. I am writing to express our support for SB 212, which addressed procedural safeguards in Montana's joint and several liability statute identified last year by the Montana Supreme Court in Newville v. Dept. of Family Services.

Medical liability cases frequently involve multiple defendants. For example, a birth may involve at least three doctors (obstetrician, neonatologist, and anesthesiologist), several nurses, and the hospital. Often one or more of the named defendants may settle with plaintiff prior to trial. In other instances, that individual or entity may no be named by plaintiff as a defendant at all, particularly where insurance coverage is lacking.

The Newville case holding prohibits use of the "empty chair" defense at trial, regardless of actual liability. Therefore, a doctor whose liability exposure is minimal may be held financially accountable for the total amount of damages.

We believe that this result is patently unfair. We urge your support for SB 212, which will restore the use of the balanced approach to liability intended by Section 27-1-703 of the MCA.

Thank you.

EXHIBIT 3
DATE 3/3/95
SB 212

Directors:
Wade Dahood
Director Emeritus
[illegible]te D. Beck
Elizabeth A. Best
Michael D. Cok
Mark S. Connell
Michael W. Cotter
Patricia O. Cotter
Karl J. Englund
Robert S. Fain, Jr.
Victor R. Halverson, Jr.
Gene R. Jarussi
Peter M. Meloy
John M. Morrison
Gregory S. Munro
David R. Paoli
Michael E. Wheat

Montana Trial Lawyers ASSOCIATION

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

Officers:
Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

March 3, 1995

Sen. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to Senate Bill 212, which amends Sec. 27-1-703, MCA, but fails to correct the constitutional deficiencies in that statute.

Background. No principle of justice is older or more fundamental in Western civilization than the right of a citizen to a defend herself or himself. The earliest Old Testament scriptures, for example, recognized as law:

> "For every breach of trust, whether it is for ox, for ass, for sheep, for clothing, or for any kind of lost thing, of which one says, "This is it," the case of ***both*** parties shall come before the judges; he whom the judges shall condemn shall pay double to his neighbor." *Exodus 22:9*

> "If a malicious witness rises against any man to accuse him of wrongdoing, then ***both*** parties to the dispute shall appear before the Lord, before the priests and the judges who are in office in those days; the judges shall inquire diligently, and if the witness is a false witness, and has accused his brother falsely, then you shall do to him as he had meant to do to his brother; so you shall purge the evil from the midst of you." *Deuteronomy 19:16-20*

Last year, the Montana Supreme Court, in *Newville v. State of Montana Department of*

Family Services, 51 St.Rep. 758, invalidated the "empty chair" portions of Sec. 27-1-703, MCA, which (1) subjected so-called non-defendants to blame in Montana courts without the opportunity to defend themselves, and (2) required plaintiffs to defend those so-called non-defendants.

The quotations from *Newville* accompanying this testimony demonstrate that the Montana Supreme Court invalidated the statute ***because the "empty chair" was empty, not just because the "empty chair" needed new upholstery.*** For example:

- "We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs." (*Newville,* page 765)
- ". . . the due process clause contains a substantive component which bars arbitrary governmental actions *regardless of the procedures used to implement them,* and serves as a check on oppressive governmental action." (*Newville,* page 763)

In December 1994, the Montana Supreme Court again addressed the fundamental and historical injustice of "empty chair" provisions in *Brockie v. Omo Construction,* 51 St.Rep. 1322, where three of the most conservative Justices (including the author of *Newville*) declared:

- "For this analysis, the key aspect is that *Newville* determined there could be no allocation of negligence to *non-parties.*" (*Brockie,* page 1328)

Those three Justices went on to specify in *Brockie* that a defendant who wants to blame someone else can name that third party as a co-defendant (not as a non-party)--<u>even if that third party is immune from liability to the claimant</u>--and thereby obtain an allocation of fault against that third party.

Senate Bill 212: the "empty chair." This bill mistakenly presumes (at page 1, line 11) that "the basis of the holding [in *Newville*] was that the statute lacked certain procedural safeguards" which would otherwise have made the "empty chair" acceptable. Consequently, this bill mistakenly presumes that it can merely add certain procedural upholstery and thus furnish the courts of justice in Montana with "empty chairs" again.

MTLA disagrees with both presumptions. Under Senate Bill 212, (1) so-called non-defendants ***will still be subjected to blame in Montana courts without the opportunity to defend themselves,*** and (2) plaintiffs ***will still be required to defend those so-called non-defendants.***

Far from correcting such constitutional defects, the procedural "safeguards" in SB 212 actually <u>aggravate</u> the injustice of an "empty chair" in several respects. Section 6(d) of the bill, for example, authorizes a real defendant to add a so-called non-party defendant *even after the statute of limitations has expired for that non-party,* depriving a plaintiff of any ability to add that non-party as an additional defendant. Nothing in the 1987 statute went so far.

Likewise, Section 6(b) of the bill--by providing that "[a] finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty"--indicates that (1) a finding of negligence of a nonparty is a presumptive or conclusive finding for purposes of the present action, and (2) in prior or subsequent actions which do not "involve" that nonparty (i.e., where the nonparty is again a nonparty), those findings of negligence may indeed be presumptive or conclusive evidence.

And since SB 212 prohibits defendants from asserting a nonparty defense unless they comply with specific notice requirements, and since a defendant cannot possibly notify unidentified nonparties, SB 212 will operate to prohibit a defendant from ever allocating negligence to unidentified (though real) tortfeasors.

Finally, MTLA notes that the Montana Supreme Court in *Newville,* having declared the "empty chair" provision of Sec. 27-1-703, MCA, unconstitutional, then addressed the next question: whether the constitutional defect extended beyond the specific "empty chair" phrases. The Court said:

> "We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, nor was it an inducement to its enactment. We further conclude that the remainder of the statute is capable of being executed in accordance with the legislative intent." (*Newville,* page 766)

In light of the repeated public testimony by the sponsor and proponents of SB 212 that the bill is a core feature of Montana's 1987 amendments to joint-and-several liability, MTLA believes that the Legislature's enactment of SB 212 will require the Montana Supreme Court when it again declares "empty chair" provisions unconstitutional, to also reconsider whether such provisions are indeed essential to the entire joint-and-several statute and thus whether the remainder of the statute can survive without them.

Senate Bill 212: the work-comp employer. In the Senate Judiciary Committee, proponents of SB 212 succeeded in expanding the bill far beyond *Newville* with an amendment deleting current protections for Montana employers (page 2, lines 20-24). As the bill acknowledges (page 1, lines 17-25), the late amendments responded to another Montana Supreme Court case, *Wetch v. Unique Concrete*, 52 St.Rep. 5, decided after the 1995 Montana Legislature had already convened.

In that case, the Montana Supreme Court simply applied the 1987 statute originally enacted at the request of many of the same proponents who now support SB 212:

> "There is nothing ambiguous or unclear about the statutory language at issue. The legislature has provided that the fact finder may not "consider or determine any amount of negligence" on the part of the injured person's employer

to the extent the employer has tort immunity under the Workers' Compensation Act." (*Wetch*, page 7)

MTLA believes, however, that SB 212 misinterprets the Court's holding in *Wetch* and threatens Montana's current workers-compensation protections for employers:

- First, the *Wetch* amendment creates a statutory conflict between Sec. 39-71-411, MCA, which provides that "an employer is *not subject to any liability whatever* for the death of or personal injury to an employee covered by the Workers Compensation Act . . ." SB 212, however, will clearly require fact-finders to consider the liability of employers (page 2, lines 17-19) and clearly require defendants to bear the burden of proof as to an employer's liability (page 3, line 11).
- Second, by expressly subjecting those employers to nonparty--and thus third-party--status, the bill will unavoidably entangle those employers in litigation. No longer will it be pointless for employees to include their immune employers in lawsuits involving workplace injuries--to the contrary, it will become essential. Employers will become subject to legal costs, attorney fees, discovery, and sanctions.
- Third, by declaring (at page 1, lines 20-22) that in *Wetch* the employer's negligence should have substantially limited the liability of the contractor, SB 212 presumably contemplates the applicability of Sec. 27-1-703(3), MCA, to the facts of that case--and therefore presumes that, even if the contractor was jointly liable for the full amount of damages. that joint liability should have been limited by contribution from the employer.

In short, MTLA believes that the *Wetch* amendment to SB 212 will compromise the exclusive remedy protections which Montana employers currently enjoy pursuant to Article II, Section 16 of the Montana Constitution and the Workers' Compensation Act.

If MTLA can provide more information or assistance to the Committee, please notify me. Thank you again for this opportunity to oppose SB 212.

Respectfully,

RBH

Russell B. Hill
Executive Director

EXHIBIT 3
DATE 3-3-95
SB 212

WHAT--EXACTLY--DID THE MONTANA SUPREME COURT SAY IN *NEWVILLE V. STATE OF MONTANA?*

"While the listed reasons for enactment of comparative negligence tort reform legislation are valid governmental purposes, *we conclude that the Montana Legislature has acted arbitrarily and unreasonably in responding to this need. We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs."* [emphasis added]

"We hold that the following portion of Sec. 27-1-703(4), MCA (1987), violates substantive due process:

> . . . persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. . . .

While we hold that the naming of "any other persons who have a defense against the claimant" *violates substantive due process where such persons are not parties,* we further emphasize that the reference in the statute to "any other persons who have a defense against the claimant" is so vague as to make its meaning impossible to understand." [emphasis added]

". . . the due process clause contains a substantive component which bars arbitrary governmental actions ***regardless of the procedures used to implement them,*** and serves as a check on oppressive governmental action." [emphasis added]

"As a result of our holding of unconstitutionality, *we have eliminated that portion of the statute which allowed an allocation of negligence to nonparties*, and in particular to nonparties who had been released from liability by the claimant, nonparties who were immune from liability to the claimant, and any other nonparties who have a defense against the claimant." [emphasis added]

"Substantive due process primarily examines the underlying substantive rights and remedies to determine *whether restrictions, such as those placed on both remedies and procedures in this case*, are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute." [emphasis added]

"In the case before us, plaintiffs contend that Sec. 27-1-703, MCA (1987), *arbitrarily prejudices plaintiffs by requiring them to exonerate nonparties.* They contend [1] there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; *and* [2] that *there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties,* particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons. *These procedural problems* [plural] *form the basis for our holding that Sec. 27-1-703, MCA (1987), in part violates substantive due process.*" [emphasis and brackets added]

"We conclude that Sec. 27-1-703(4), MCA (1987), *unreasonably mandates an allocation of percentages of negligence to nonparties* without any kind of procedural safeguard. . . . *Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties.*" [emphasis added]

"We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), *is not essential to the integrity of the statute*, nor was it an inducement to its enactment." [emphasis added]

NEWVILLE *SAYS THE "EMPTY CHAIR" IS EMPTY--*
SB 212 SAYS IT JUST NEEDS NEW UPHOLSTERY!

EXHIBIT 4
DATE 3/3/95
SB 212

LAW OFFICES
NASH, GUENTHER & ZIMMER
ASPEN PROFESSIONAL COMPLEX
1700 WEST KOCH, SUITE 4
P.O. BOX 1330
BOZEMAN, MONTANA 59771-1330

MARK L. GUENTHER
SARAH NASH ZIMMER

DONALD A. NASH
OF COUNSEL

TELEPHON
(406) 586-0
FACSIMIL
(406) 586-0

January 31, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Re: Senate Bill 212

Dear Senator Crippen:

I write this letter in opposition to Senate Bill 212. I am quite familiar with the Newville case and decision since I represented defendant Martha Kuipers in the trial of that action.

My major concern regarding Senate Bill 212 is its (1) fundamental unfairness and (2) discouragement of settlements. A "nonparty defense" is a new legal creature, neither a plaintiff or defendant in litigation. In the Newville case, defendant Edna Goodwin reached a settlement with the plaintiffs expecting to buy peace of mind. Unfortunately, this did not occur. She suffered additional embarrassment through newspaper reports of negligence notwithstanding her absence as a party or witness at trial. The bill is fundamentally unfair. The City of Bozeman was the other "nonparty defense" under this bill.

If any party believes another party is responsible, the existing rules of civil procedure covers all concerns raised by this Senate Bill. The "nonparty defense" provisions of this bill are fraught with inequities and will provide futile ground for future litigation, and a further wasting of valuable resources of the citizens of Montana, the insurers of Montana, and the governmental entities of Montana.

I thank you for your consideration of this letter.

Sincerely,

Mark L. Guenther

MLG:cap

EXHIBIT 5
DATE 3/3/95
SB 212

GARY L. BEISWANGER
ATTORNEY AT LAW

Rocky Village Center I
1500 Poly Drive
Billings, Montana

406-248-2694

MAILING ADDRESS:
P.O. Box 20562
Billings, MT 59104

February 3, 1995

Senator Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Re: SB 212

Dear Bruce:

Do you, or your business, want to be held liable for damages as the result of a lawsuit in which you or your business is not a party and about which you know nothing until the judgment is rendered?

SB 212 is not a procedural change to conform to the Montana Supreme Court decision Newville v. State of Montana. SB 212 is counter to Newville. This is a dangerous bill. Please vote **NO.**

Sincerely yours,

GARY L. BEISWANGER

GLB:jb

EXHIBIT 6
DATE 2/3/95
SB 212

HOWARD F. STRAUSE
Attorney at Law
#18 Sixth Street, North
P.O. Box 2608
Great Falls, MT 59403
(406) 727-8466
Fax (406) 771-7227

January 30, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Dear Senator Crippen:

I am writing to you in regard to Senate Bill 212, an amendment to Montana's Joint and Several Liability Law. I believe those amendments would not serve the people of Montana.

Let me give you an example of the past harm caused by the present Joint and Several Liability Law, which would resurface under Senate Bill 212. I represented an individual who was a passenger in a vehicle. The driver of the vehicle was a very close friend of the passenger. An accident resulted. The passenger was of the opinion and the evidence certainly indicated that the driver of the vehicle he was in, was not in any way at fault. Instead, the accident was the total fault of the other driver.

Although the Defendant in this lawsuit was able to join the other driver as a named Defendant, he did not do so. This was done for purely tactical reasons. Senate Bill 212 would allow this practice to continue.

Instead of joining the other driver as a Defendant, the Defendant chose to, at trial, blame the "empty chair". The Defendant knew that it would be much easier to blame a person who was not in the courtroom and not able to present a defense.

On the other hand, since the Plaintiff did not feel that the driver of the car in which he was a passenger was at fault, that Plaintiff could not name as a party that driver. To do so would have been a violation of Rule 11, MT.R.Civ.P. Additionally, since those two individuals were close friends, naming the driver would have had the effect of not only destroying the friendship, but cause that driver to needlessly incur attorney's fees, not to mention inconvenience and worry.

The bottom line is if a Defendant feels some other person is responsible and there are facts to support that belief, the Defendant name that person as a party. Under Montana's present law and the *Newville* decision, a Defendant would be totally protected under these circumstances. There is no good reason to allow a Defendant to point the finger at someone else, when that Defendant decides not to name that person as a party to a lawsuit.

Sincerely yours,

Howard F. Strause

HFS/jan

EXHIBIT 7
DATE 3/3/95
SB 212

LAWRENCE A. ANDERSON
ATTORNEY AT LAW

#18 SIXTH STREET NORTH
P.O. BOX 2608
GREAT FALLS, MONTANA 59403
TELEPHONE (406) 727-8466
FAX (406) 771-7227

January 31, 1995

Senator Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: SB 212

Dear Senator Crippen:

I wrote the briefs which successfully challenged the constitutionality of § 27-1-703 M.C.A. in *Newville v. State of Montana Department of Family Services*, 883 P.2d 793, 51 St.Rptr. 758 (1994). I have reviewed SB 212.

Senate Bill 212 does not correct the deficiencies which the Supreme Court found in the *Newville* case.

In addition, SB 212 should more aptly be characterized as the Lawyer's Work Relief Bill. It will ensure that Plaintiff's lawyers will have to undertake an epistemological analysis of causation and list all conceivable persons in the epistemological chain of causation as defendants. This will assure much additional work for insurance defense lawyers and other lawyers in defense of people in the epistemological chain of causation. Further, it will assure that the primary purposes of Rule 1 of the Montana Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action" will never be met in a personal injury action.

This bill will also ensure that innocent victims of wrongful conduct will go uncompensated because of the elaborate and arbitrary process guaranteed by SB 212. It will assure that wrongdoers will succeed in shifting responsibility for their wrongful conduct to the public.

Very truly yours,

Lawrence A. Anderson

LAA/hjr

cc: Eve Franklin
Chris Christiaens
Steve Doherty
Bill Wilson

EXHIBIT 8
DATE 3/3/95
SB 212

LAW OFFICES OF
ALAN J. LERNER

P.O. BOX 1158
KALISPELL, MT 59903-1158

(406) 756-9100
FAX (406) 756-9105

January 31, 1995

The Honorable Larry L. Baer
Montana State Senator
Montana State Capitol Building
Capitol Station
Helena, MT 59620

Re: *Senate Bill No. 212*

Dear Larry:

I urge you, as a member of the Senate Judiciary Committee, to do everything in your power to kill SB 212, which has the purpose of overruling *Newville*. The bill attempts to re-establish the "empty chair" defense. I believe the bill as drafted is unconstitutional, but will not address that issue now.

The main problem with the bill is that it will make every lawsuit into a "federal case". Where a defense attorney gets a shot at muddying the waters with defendants who the jury can't see, the defense attorney will take that opportunity. For instance, assume that a citizen is driving along a Montana highway/road when he is hit from behind by another driver with adequate insurance. The at-fault driver tells his insurance company that the road was constructed or maintained in such a way as to create some danger. Even though the case against the state or county for negligent construction or maintenance of the road is not strong, the insurance company would be encouraged by SB 212 to advance such a theory. The injured citizen may not choose to pursue such a far-fetched, weak theory against the state or county for strategic and tactical reasons; namely, making it appear to the jury that his real case is weak or he is simply out to get all he can get from anyone, regardless of the fault. Under the dictates of SB 212, however, the injured citizen would be foolish not to join the state or county in the suit on the unlikely event that a jury would find some fault with the road construction or maintenance.

As is apparent, the "empty chair" defense proposed by SB 212 will needlessly increase the cost and complexity of litigation. I believe that if this bill is passed, the courts will become even more clogged than they are at the present time.

More importantly, an injured party may not be justly compensated for his or her damages due to the "empty chair" defense. The defense would allow at-fault parties to escape responsibility for their negligent acts while penalizing those who have been injured.

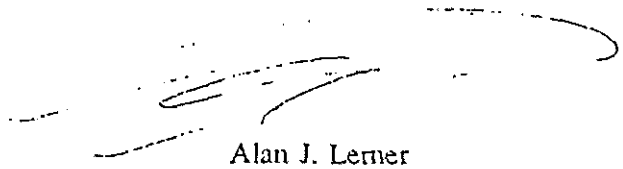
Finally, on the subject of attempting to apportion percentages of fault, there can be no objective standard. As a trial attorney with more than 20 years experience, I find it impossible to assign percentage numbers of fault to various potential defendants in any type of litigation. The process of attempting to set a percentage of fault on a responsible party is extremely misleading for the bar and jury and results in the jury guessing at numbers.

SB 212 merely discourages settlement, increases the cost and complexity of litigation, further muddies the waters, and exacerbates an already untenable, unfair and unreliable system of fault apportionment.

Thank you very much for considering my comments. I look forward to seeing you when you return from the wars. You seem to be making quite a splash in Helena. I read a lengthy and complimentary article in the Missoulian about you this morning.

See you when you get back. Best personal regards.

Very truly yours,



Alan J. Lerner

AJL/lco

EXHIBIT 9
DATE 2/3/95
SB 212

Bottomly Law Offices

Attorneys:
Joe Bottomly
Anne Biby

Lori Johnson,
Legal Assistant

1108 South Main, Suite 4
P.O. Box 1976
Kalispell, MT 59903-1976
(406) 752-3303
Fax: (406) 755-6398

#18 Sixth Street North
Suite 201
Great Falls, MT 59401
(406) 771-0073

January 31, 1995

Sen. Bruce Crippen
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Re: Senate Bill 212

Dear Senator Crippen:

This is a note to register my strong opposition to Senate Bill 212. Under the guise of a mere procedural change, to conform with Montana Supreme Court's *Newville* decision, this Bill makes matters worse in almost all ways.

Accountability and responsibility are key words this year. Senate Bill 212 promotes just the opposite. It does this by protecting wrongdoers for accountability of their acts against innocent victims. It then dumps the burden, in many cases, at the foot of the taxpayers in the form of medicaid and welfare benefits which we have to pay for seriously injured victims.

Make no mistake, any defendant who has a legitimate claim against a non-party should be able to join that person as a defendant. However, to allow them to join "phantom" defendants to point fingers at is grossly unfair. (Haven't you ever seen the cartoon *Family Circle*'s depiction of the ghosts "I don't know" and "Not Me" as the ever present ghosts who stole the cookies from the cookie jar?)

Joint and several liability is perfectly fair and proper when dealing with multiple defendants, all of whom are substantially at fault. Can you imagine three bank robbers arguing to a judge that their sentence should be cut in thirds because three people participated rather than one? All but the most insignificant wrongdoers should be required to be accountable and responsible for the full damage that they caused. (This

does not prevent them from offsetting any settlements other defendants have paid or suing other defendants themselves to get contribution.)

I strongly urge you to: (1) require that if a defendant wants to defend on the basis of someone else's fault, they must name them as a party; (2) make complete joint and several liability the law when dealing with completely innocent victims; and (3) make several liability only applicable to those defendants who are truly nominal, i.e., ten percent at fault or less.

I have several cases where the injustice of this Bill would make you cringe. However, the *Newville* case itself is perhaps the best example of how responsibility and accountability can be thwarted by the use of phantom defendants' smoke and mirrors.

Sincerely,

BOTTOMLY LAW OFFICES

Joe Bottomly

JRB/lmj

EXHIBIT 10
DATE 3/3/95
SB 212

Bottomly Law Offices

Attorneys:
Joe Bottomly
Anne Biby

Lori M. Wiley,
Legal Secretary

1108 South Main, Suite 4
P.O. Box 1976
Kalispell, MT 59903-1976
(406) 752-3303
Fax: (406) 755-6398

#18 Sixth Street North
Suite 201
Great Falls, MT 59401
(406) 771-0073

January 31, 1995

Senator Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Dear Senator Crippen:

I am writing to address my concerns about Senate Bill 212. This bill will do nothing to reduce litigation--instead, it will force parties to sue every conceivable entity involved, no matter how tangentially, in an injury. Otherwise, some defense attorneys will continually point to "the empty chair" in an effort to divert the blame for an injury onto an entity which can neither defend itself nor testify for the jury's benefit.

Our Supreme Court has already ruled that, if a defendant seeks to shift the blame to another entity, he must bring that party into the lawsuit so that the jury can make an informed decision regarding liability. Clearly from the number of defense verdicts in Montana, our juries are already cautious about assigning blame to the parties being sued.

Certainly, if a defendant genuinely believes that another entity is negligent, he will not hesitate make it a party to the lawsuit. We should be suspicious of attorneys who *want* to keep that chair empty--certainly they seek to lay the blame at the feet of some phantom party without allowing him to speak in his own defense.

I urge you to take a close look at Senate Bill 212 and the effects it will have. If a party is accused, then let him be heard.

Sincerely,

Anne Biby

EXHIBIT 11
DATE 3/3/95
SB 212

LAW OFFICES
DONALD W. MOLLOY LTD.
10 North 27th Street, Suite 350
P.O. Box 1617
Billings, Montana
59103

Donald W. Molloy
Roberta Anner-Hughes

406- 248-7521
(Fax) 406-248-7525

January 31, 1995

Senator Bruce Crippen
Senate Judiciary Committee
Room 325
State Capitol
Helena, MT 59620

Dear Senator Crippen,

I am writing in regard to Senate Bill 212. I am writing as a mother, a citizen, and a trial lawyer, in that order. Senate Bill 212 could result in far more harm than good. The provisions which allow Defendants to attempt to blame non-parties will only add to judicial problems, not resolve them.

I generally consider legislation by considering scenarios of what could take place should something happen to my own children. If you pass this law, it will allow wrongdoers to simply point their fingers to another person, someone who isn't even in the room. Frankly it is the type of behavior that we discourage as parents, and will not tolerate as adults. If my child is seriously injured or killed through another's negligence, that wrongdoer can point to someone else as the cause, without ever calling that person to the stand or seating that person in a courtroom.

The bill says, ". . . the trier of fact shall consider the negligence of nonparties. . ." My first question is how? How can anyone consider the negligence of another when there is no one to defend that position, or cross-examine that position?

As a lawyer, I believe the bill will only keep people from settling lawsuits, something none of us want. Our profession is much maligned these days and I think it is something each of us needs to consider. However, by passing this bill, we are encouraging non-settlement and game playing. Stopping this bill would be a step in the right direction.

I appreciate your work in Helena. I only ask that you think of individual Montana citizens when you vote. I would urge you not to pass Senate Bill 212.

Sincerely,

MOLLOY LAW OFFICES

Roberta Anner-Hughes

EXHIBIT 12
DATE 3/3/95
SB 212

Joe Arvizu Rodriguez
ATTORNEY AT LAW

P.O. BOX 820
LAME DEER, MONTANA 59043
TELEPHONE: 406/477-6315
FAX: 406/477-8361

February 1, 1995

Russell B. Hill
Executive Director
MTLA
Helena, MT 59601

RE: Senate Bill 212

Dear Mr. Hill:

Pursuant to your request, enclosed please find two (2) letters to both Bruce Crippen and Reiny Jabs.

Please feel free to contact my office if I may be of further assistance regarding this bill.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

enclosures

Joe Arvizu Rodriguez

ATTORNEY AT LAW

P.O. BOX 82(
LAME DEER, MONTANA 5904
TELEPHONE: 406/477-631
FAX: 406/477-836

January 31, 1995

Sen. Reiny Jabs
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Dear Senator Jabs:

As a lawyer servicing rural Montanans, I have encountered situations where the "empty chair" provisions of Montana's 1987 joint/several amendments, Section 27-1-703 (4), MCA, have devastated rural working class people.

In one case in particular, the evidence against the corporate defendant was so extensive and soundly supported by evidence at trial, that the Judge commented during jury deliberations that he was certain we would return to Court for the calculation of damages phase of the trial. Everyone was taken aback by the jury's finding of no negligence by the defendant.

The defendant was able to try the case against non-parties and convince the jury that everyone but the defendant was guilty. The evidence demonstrated that the corporate defendant, a tavern, sold well over a dozen alcoholic beverages to an already obviously intoxicated individual. This person later killed herself and two other innocent motorists in a tragic motor vehicle accident.

Rather than curing the deficiencies of 27-1-703 (4) MCA, SB 212, would serve to make such inequitable legal results more easily obtained by wealthy defendants.

I believe that SB 212 will not benefit working class and rural Montanans, and I urge you to oppose this measure.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

EXHIBIT 10
DATE 3-3-95
SB 212

Joe Arvizu Rodriguez
ATTORNEY AT LAW

P.O. BOX 820
LAME DEER, MONTANA 59043
TELEPHONE: 406/477-6315
FAX: 406/477-8361

January 31, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Dear Senator Crippen:

As a lawyer servicing rural Montanans, I have encountered situations where the "empty chair" provisions of Montana's 1987 joint/several amendments, Section 27-1-703 (4), MCA, have devastated rural working class people.

In one case in particular, the evidence against the corporate defendant was so extensive and soundly supported by evidence at trial, that the Judge commented during jury deliberations that he was certain we would return to Court for the calculation of damages phase of the trial. Everyone was taken aback by the jury's finding of no negligence by the defendant.

The defendant was able to try the case against non-parties and convince the jury that everyone but the defendant was guilty. The evidence demonstrated that the corporate defendant, a tavern, sold well over a dozen alcoholic beverages to an already obviously intoxicated individual. This person later killed herself and two other innocent motorists in a tragic motor vehicle accident.

Rather than curing the deficiencies of 27-1-703 (4) MCA, SB 212, would serve to make such inequitable legal results more easily obtained by wealthy defendants.

I believe that SB 212 will not benefit working class and rural Montanans, and I urge you to oppose this measure.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

EXHIBIT 13
DATE 3/3/95
SB 212

Joan Jonkel Attorney At Law
250 Station Drive
Box 8687
Missoula, MT 59807
406/721-1835

January 30, 1995

Senator Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

Dear Senator Crippen:

I am writing to urge you not to support SB 212.

Far from clarifying the situation with regard to Section 27-1-703 MCA, this bill will further complicate matters and encourage additional lawsuits instead of equitable settlements.

Thank you.

Very truly yours,

Joan Jonkel

JOAN JONKEL

JJ/rc

DATE 2/2/95
SB 212

LAW OFFICES
DONALD W. MOLLOY LTD.
10 North 27th Street, Suite 350
P.O. Box 1617
Billings, Montana
59103

Donald W. Molloy
Roberta Anner-Hughes

406-248-7521
(Fax) 406-248-7525

January 27, 1995

Senator Gary Forrester
Montana Legislature
Montana State Capitol
Capitol Station
Helena MT 59620

Dear Senator Gary:

I recently noted that you are signed on as sponsor of SB 212.

I hope that you will reconsider. This bill is a disaster. I would like the opportunity to talk with you about it.

Senate Bill 212 is going to create terrible conflicts and have a significant impact on innocent people. I urge you to withdraw your support of this bill. Again, I certainly would like the opportunity to visit with you about it.

Is there some time I can come to Helena to visit you about this bill?

Sincerely,

MOLLOY LAW OFFICES

Donald W. Molloy

DWM:sp

bcc Russ Hill

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 3/3/95

BILL NO. SB 212 SPONSOR(S) Sen. Bishop

PLEASE PRINT PLEASE PRINT PLEASE PRIN

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Lon Dale 2555 Sunright; Missoula, MT	Self		✓
Tom Hopgood	Mt. Indep. Bankers Assoc.	✓	
Charles R. Brooks	Self & Chamber	✓	
JIM TILTWILER	MT LIABILITY COALITION	✓	
W James Kembel	City of Billings	✓	
MARIE DURKEE	MT LIABILITY ASSN MT TAVERN ASSN	✓	
JAMES D. ELSHOFF	SELF (SB286)	✓	
BOB ASHABRANER	State Farm Ins	✓	
GREG JACKSON	MACO/MPIA Montana Solid Waste Coal.	✓	
Sue Wenger Trca	MT Optometric Assn	✓	
Norm Grosfield			✓
JOHN CADBY	MT BANKERS ASSN	✓	
Sue Weingarten	MT Defense Trial Lawyers	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT F
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE

BILL NO. SB 212 SPONSOR(S)

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Mona Jamison	Doctors' Co	✓	
STAN KALECZYC	MT MUNICIPAL INSURANCE AUTHORITY	✓	
David Owen	MT Chamber	✓	
Ben Havdahl	MT Motor Carriers Assn	✓	
JIM AHRENS	MT Hospital Assn	✓	
DAN WALKER	US WEST	✓	
DEBBIE BERNEY	P.I.A.	✓	
John Alke	MT. Labulist Coalition	✓	
Russell B Hill	MT Trial Lawyers		✓
[signature]	Ont Med Assoc.	✓	
J. Shontz	MT Assoc. Rec Hrs	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE

BILL NO. SB 212 SPONSOR(S)

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Michael Leedy	MSBA	X	
Bob Worthington	MPED	✓	
Donald W. Hutchinson	Division of Banking & Fin	✓	
Jacqueline Denmark	Am. Ins. Assoc.	✓	
Bill Grandoulis	Dept. of Admin	X	
Robert White	Bozeman Chamber	X	
Don Allen	MT. Wood Products Assn	✓	
Roger McGlenn	FIAM	✓	
Wm Hanaka	Farmers Insurance Group	✓	
RILEY JOHNSON	NFIB	✓	
GAIL ABERCROMBIE	MT Petroleum Assn	✓	
Steve Turkiewicz	Mt Auto Dealers Assn	✓	
Tom Harrison	Mt. Soc of CPA's	—	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993
wp:vissbcom.man
CS-14

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on March 13, 1995, at 8:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	NONE
Executive Action:	SB 133 TABLE
	SB 185 BE CONCURRED IN AS AMENDED
	SB 189 BE CONCURRED IN AS AMENDED
	SB 212 BE CONCURRED IN
	SB 402 BE CONCURRED IN AS AMENDED
	HB 517 RECONSIDER ACTION
	HB 517 RECONSIDER ACTION POSTPONED

REP. ANDERSON explained that he had asked the chairman to hold this bill as well as some others since he had to be out of the committee to present bills in another committee. He believed that had his vote been cast as he wished it, the bill would have died in committee. He thought they would save themselves time if they disposed of the bill in committee rather than on the House floor.

REP. MC GEE asked if he had cast a vote for that bill and **REP. ANDERSON** answered that he had not, but had left a note asking that the bill not be considered in his absence. He had left a blanket proxy for other bills to be voted with the chairman's votes.

REP. BOHARSKI said he was also absent for the vote on this bill and would have voted against the bill. It was his understanding that there was not going to be executive action on it while he was absent and therefore had not left a proxy.

Vote: **The motion to reconsider HB 517 carried 9 - 8 by roll call vote.**

CHAIRMAN CLARK said they would postpone action until copies of the bill could be supplied to the committee.

EXECUTIVE ACTION ON SB 212

Motion: **REP. ANDERSON MOVED SB 212 BE CONCURRED IN.**

Discussion: **REP. BOHARSKI** said he did not have any use for joint liability. He said that a compromise was reached previously which allowed the 50% joint and several liability. It was his belief that this bill tended to hold with public policy and therefore it should pass.

REP. HURDLE spoke against the bill. She felt it spread responsibility too far and eliminated some liability.

REP. KOTTEL spoke in favor of the bill and like **REP. BOHARSKI** was not sure it would hold up in court. She stood for the principle that when someone was under 50% liable for their actions and either an immune defendant or a defendant who had settled out of court, it was not fair for that person who was left in the courtroom to hold the bag for the balance of the liability. This bill would allow the jury to determine liability under 50% to allocate some of it to the immune or the settled-out plaintiff and then to only leave the defendant who remained in court to pay that percentage which the jury had found them to be liable for. She said that seemed fair and that nothing forces a plaintiff to settle with another joint tortfeasor. If the plaintiff is unsure as to who is liable in terms of percentage, it is to the plaintiff's advantage to keep both tortfeasors in the action and

bring them both into the court to allow the jury to make the determination.

REP. MC GEE asked if she read the bill to allow a defendant in a case to testify that they had had a conversation which would have given information resulting in shared liability.

REP. KOTTEL said the fear of the opponents was that it would produce an empty chair in the courtroom and the disclosure of the conversation would result in the jury ascribing more blame on the person represented by the empty chair (absent from the courtroom) than the present defendant. Her opinion was that the bill would allow the attorney to let the jury hear about the other defendant and it would allow the plaintiff to defend the other person. She said that would put an additional burden on the plaintiff, but the plaintiff settled out of court with that other defendant who was not in the courtroom.

REP. HURDLE objected to the concept that someone could pass up their responsibility for public safety through a casual conversation with a third party.

Vote: **The motion carried to concur in SB 212, 16 - 2, REPS. HURDLE and WYATT voted no.**

EXECUTIVE ACTION ON SB 189

Motion: **REP. MC CULLOCH MOVED SB 189 BE CONCURRED IN.**

Motion/Vote: **REP. SOFT MOVED TO AMEND PAGE 3, LINE 9 AS PROPOSED BY THE SPONSOR. The motion carried unanimously by voice vote.**

Motion/Vote: **REP. MC CULLOCH MOVED TO AMEND PAGE 4, LINE 6 AS PROPOSED BY THE SPONSOR. The motion carried 17 - 1, REP. BOHARSKI voted no.**

Motion: **REP. AHNER MOVED SB 189 BE CONCURRED IN AS AMENDED.**

Discussion: **REP. BOHARSKI** asked for an explanation and the compelling reason for the Senate's amendments on lines 11 through 14.

REP. HURDLE explained that it would allow the Department of Justice the authority to act on a tribal agreement. **CHAIRMAN CLARK** said that was essentially correct and that there were no opponents to the bill. **REP. SOFT** read his notes based on testimony from the department.

REP. BOHARSKI and **CHAIRMAN CLARK** discussed the ramifications of the bill which had been detailed in the hearing.

Vote: **The motion carried 16 - 1, REP. BOHARSKI voted no.**

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 3/13/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓ 11:35	A	
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

HOUSE STANDING COMMITTEE REPORT

March 14, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **Senate Bill 212** (third reading copy -- blue) **be concurred in.**

Signed: Bob Clark
Bob Clark, Chair

Carried by: Rep. Anderson

Committee Vote:
Yes 16, No 2.

591251SC.Hbk

SENATE BILL NO. 212

INTRODUCED BY BISHOP, BROWN, HALLIGAN, HARP, BENEDICT, JACOBSON, TVEIT, GAGE, GRIMES, JABS, HERTEL, GRINDE, FOSTER, GRADY, BAER, KEATING, FORRESTER, PAVLOVICH, WATERMAN, CRIPPEN, R. JOHNSON, HAYNE, HIBBARD

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PROCEDURAL SAFEGUARDS FOR JOINT AND SEVERAL LIABILITY DETERMINATIONS; PERMITTING THE CONSIDERATION OF NEGLIGENCE BY AN EMPLOYER OR COEMPLOYEE IN CERTAIN CIVIL ACTIONS; AMENDING SECTION 27-1-703, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, on August 29, 1994, the Montana Supreme Court, in Newville v. State of Montana Department of Family Services, 883 P.2d 793, 51 St. Rptr. 758 (1994), struck down as unconstitutional part of section 27-1-703, MCA, limiting the common-law doctrine of joint and several liability; and

WHEREAS, the basis of the holding was that the statute lacked certain procedural safeguards; and

WHEREAS, the Legislature wishes to provide for procedural safeguards considered necessary by the Montana Supreme Court~~.~~; AND

WHEREAS, ON JANUARY 18, 1995, THE MONTANA SUPREME COURT, IN WETCH V. UNIQUE CONCRETE CO., ___P.2D___, 52 ST. RPTR. 5 (1995), INTERPRETED SECTION 27-1-703, MCA, TO PRECLUDE THE TRIER OF FACT FROM HEARING ABOUT OR CONSIDERING THE NEGLIGENCE OF THE PLAINTIFF'S EMPLOYER IN A CASE IN WHICH THAT NEGLIGENCE SHOULD HAVE ABSOLVED OR SUBSTANTIALLY LIMITED THE LIABILITY OF A CONTRACTOR DOING WORK ON THE EMPLOYER'S OFFICE BUILDING; AND

WHEREAS, THE LEGISLATURE WISHES TO PROVIDE THAT NEGLIGENCE ON THE PART OF THE CLAIMANT'S EMPLOYER OR COEMPLOYEE MAY BE CONSIDERED AND DETERMINED AS PART OF A NONPARTY DEFENSE, AS PROVIDED IN THIS BILL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-703, MCA, is amended to read:

"**27-1-703. Multiple defendants -- determination of liability.** (1) Except as provided in subsections

(2) and (3), whenever the negligence of ~~any~~ a party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) ~~Any~~ A party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to ~~him~~ that party, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants~~, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant~~. The liability of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, must also be considered by the trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all ~~such~~ persons listed in this subsection. ~~However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such the employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state Montana, of any other state, or of the federal government.~~ Contribution ~~shall~~ must be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section ~~shall make~~ makes any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is

liable for contribution under this section only up to the percentage of negligence attributed to ~~him~~ that party.

(6) (a) In an action based on negligence, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty, which may be referred to as a nonparty defense.

(b) In determining the percentage of liability attributable to persons who are parties to the action, the trier of fact shall consider the negligence of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, if a nonparty defense is properly asserted in accordance with this subsection (6). A finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty.

(c) The burden of proof as to a nonparty's liability is on the defendant or defendants who affirmatively plead the nonparty defense, but this subsection (6) does not relieve the claimant of the burden of proving that negligence on the part of the defendant or defendants contributed as a proximate cause to the injury of the claimant or alter other proof requirements.

(d) A nonparty defense must be affirmatively pleaded as a part of the answer. A defendant who gains actual knowledge of a nonparty defense after the filing of that defendant's answer may plead the defense with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

(i) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense;

(ii) giving the claimant a reasonable opportunity to defend against a nonparty defense; and

(iii) giving the claimant a reasonable opportunity, if appropriate, to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. However, this subsection (iii) does not extend the period of limitation or revive the action if the period of limitation has expired.

(E) IF A DEFENDANT ASSERTS A NONPARTY DEFENSE, THE DEFENDANT SHALL NOTIFY EACH NONPARTY WHO THE DEFENDANT ALLEGES CAUSED THE CLAIMANT'S INJURIES, IN WHOLE OR IN PART. NOTIFICATION MUST BE MADE BY MAILING THE DEFENDANT'S ANSWER TO EACH NONPARTY AT THE NONPARTY'S LAST-KNOWN ADDRESS BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED."

NEW SECTION. **Section 2. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its

applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 3. Applicability.** [This act] applies to all claims for relief not reduced to final judgment on [the effective date of this act].

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

-END-